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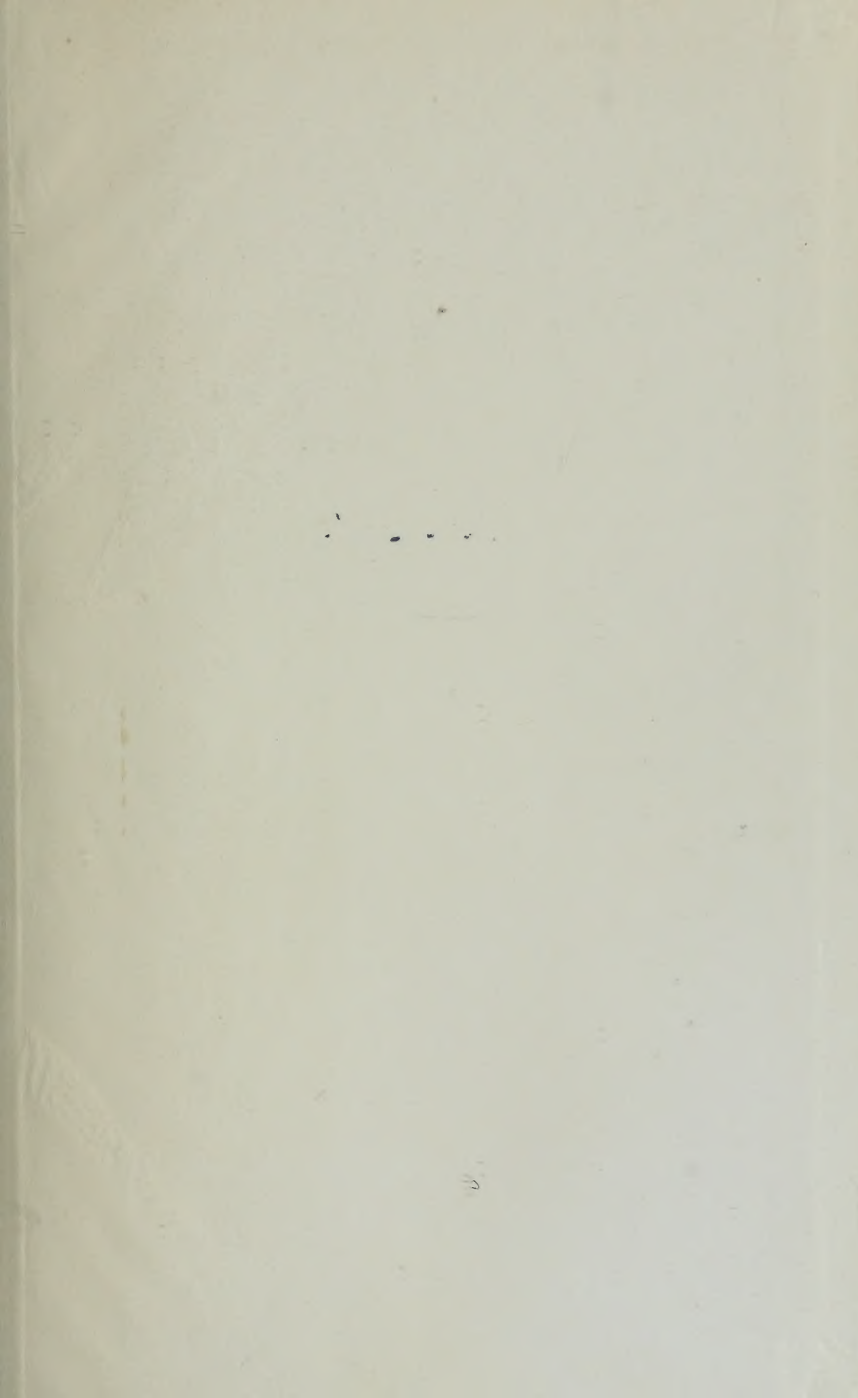
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2002
No. 11766

United States
Circuit Court of Appeals
For the Ninth Circuit

see vol. 2501
BURNHAM CHEMICAL COMPANY, a corpora-
tion,

Appellant,

vs.

BORAX CONSOLIDATED, LTD., a corporation,
PACIFIC COAST BORAX COMPANY, a
corporation, UNITED STATES BORAX
COMPANY, a corporation, and AMERICAN
POTASH & CHEMICAL CORPORATION,
Appellees.

Transcript of Record
IN TWO VOLUMES
VOLUME II
Pages 451 to 824

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED
JAN 28 1948

PAUL P. O'BRIEN, CLERK

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IN TWO VOLUMES

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Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

GEORGE B. BURNHAM,

recalled.

Cross-Examination
(Resumed)

Mr. Harrison: Shall we proceed, your Honor?

The Court: Yes, go right ahead.

Q. (By Mr. Harrison): Mr. Burnham, when Court adjourned yesterday, we were talking about your amended complaint in the suit brought in Carson City before the District Court to enjoin the enforcement of the fraud order, you recall that, do you not? A. Yes.

Q. You recall also the fact, do you not, that when you filed that amended complaint you had attached to it several exhibits? A. Yes.

Mr. Harrison: I have now, Mr. Carr, certain certified copies of three of these exhibits, certified to by the Clerk of the District Court and I offer them in evidence.

Mr. Carr: May I see them?

Mr. Harrison: Yes, surely.

Mr. Carr: This is one; they are not all three together.

Mr. Harrison: I offer in evidence, if the Court please, a certified copy, certified by the Clerk of the District Court for the District of Nevada of an exhibit attached to the amended complaint already introduced in evidence in this case, consisting of a letter to Mr. Floyd McEan from Burnham Chemical Company by G. B. Burnham, dated October, 1923, and I offer that in evidence as Defendants' Exhibit next in order.

(Testimony of George B. Burnham.)

Mr. Carr: October 6—what year? [139]

Mr. Harrison: 1923.

Mr. Carr: We renew our objection.

The Court: This is an exhibit to the complaint already in evidence?

Mr. Harrison: Yes, this is an exhibit to the complaint already in evidence, your Honor.

The Court: Very well, I will overrule the objection.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit D.)

Q. (By Mr. Harrison): Now, Mr. Burnham, you recall the fact that this letter which I now show you was an exhibit to the amended complaint in that suit, do you not?

A. I haven't looked over the letter for a long time.

Q. Well, it is so certified by the Clerk of the Court. A. All right.

Q. I will ask you to look at it and ask you if it is not a fact that that is a copy of a letter which you addressed under its date to Mr. McEan?

A. It is a copy, since I must have written it, because it is certified to.

Q. And you did write it, according to your best recollection—that is the original of that letter on its date? A. Yes.

Q. Now, this letter is addressed to Mr. Floyd McEan, Post Office Inspector, at Reno, Nevada, and

(Testimony of George B. Burnham.)

is dated October 6, [140] 1923. At that time Mr. McEan was the post office inspector at Reno, Nevada, was he not? A. Yes.

Q. And the Burnham Chemical Company at that time was under investigation by the Post Office, was it not? A. Yes.

Mr. Harrison: I will read two paragraphs of the letter, and Mr. Carr can read anything else he wishes.

I am calling your attention, Mr. Burnham, to these two paragraphs:

“However, the success of our enterprise is not looked upon with favor by our potash and borax competitors. Our chief competitor who is said to be controlled by the Borax Consolidated of London, England, would be seriously affected should we produce borax at \$5 per ton. They have therefore taken steps to hinder our development as shown by the 3100-acre reservoir site for Solar Evaporation Searles Lake brine, which was applied for by the San Bernardino Borax Mining Company and protested against to the Commissioner of the General Land Office by the Federal Lessees at Searles Lake.

“We have reason to believe that there are unseen forces at work tending to hinder the financing of our enterprise and yet we believe the cooperation of the Government in assisting us in our financing is a matter of mutual [141] interest.”

(Testimony of George B. Burnham.)

Now, calling your attention to this particular sentence: "The success of our enterprise is not looked upon with favor by our potash and borax competitors"—I will ask you to whom you intended to refer by those words, "our potash and borax competitors"?

A. The American Trona Company and the Pacific Coast Borax Company, and possibly some other of our competitors.

Q. Well, I think you said yesterday that the American Trona Company was the former name of the American Potash & Chemical Corporation; that is correct, is it not? A. Yes.

Q. In the next sentence you say, "Our chief borax competitor, who is said to be controlled by the "Borax Consolidated of London, England, would be seriously affected".

To whom did you refer as your "chief borax competitor"?

A. Pacific Coast Borax Company.

Q. In referring to the fact that "they have taken steps to hinder our development", whom were you referring to as "they", the persons who had taken steps to hinder your development?

A. I felt there was ruthless competition going on.

Q. I am asking you——

A. Yes, the Pacific Coast Borax.

Q. The Pacific Coast Borax? A. Yes.

(Testimony of George B. Burnham.)

Q. Now, then, you say in the next paragraph:

“We have reason to believe that there are unseen forces at work tending to hinder the financing of our enterprise”.

To whom did you refer as the “unseen forces”?

A. I don't remember what I had in mind at that time.

Q. Haven't you any idea at the present time what you had in mind?

A. Well, I presumed our competitors would be one of the unseen forces.

Q. They were some of the “unseen forces,” at least, what you had in mind when you wrote that letter?

A. Yes, in normal competition one would naturally expect your competitors would not want to see you go ahead.

Q. But competitors are seen forces, ordinarily, are they not? Are they not?

A. Yes, of course, but I had no knowledge that there was any laws being violated or any conspiracy whatsoever.

Q. But you considered that at that time in 1923 these defendants, the Pacific Coast Borax and the American Trona were trying to hinder your development, did you not?

A. I am not sure when I wrote that letter just exactly what I had in mind.

Q. You are not sure to whom you referred as the “unseen forces”?

(Testimony of George B. Burnham.)

Mr. Carr: He did not say that. [143]

Mr. Harrison: Well, I will withdraw that question.

Q. Are you sure, or reasonably sure at the present time what you had in mind when you referred to those "unseen forces"?

A. I had no doubt in mind that one of the "unseen forces" was no doubt our competitors.

Mr. Harrison: We offer in evidence a copy of a letter of October 22, Mr. Carr. Have you seen that?

Mr. Carr: Let me see that.

Q. (By Mr. Harrison): Referring again to that matter of the "unseen forces," you had at that time what other unseen forces in mind than the Pacific Coast Borax and the American Trona Company? A. I don't remember.

Q. Did you testify in your deposition that you made some reference to the "Blue Sky Commissioner"?

A. Some of the states did not like the idea of our mailing literature into their states, and therefore they were protesting our mailing or soliciting the sale of our stock in their states by mail.

Q. Where was your company organized?

A. In Nevada.

Q. Where did you live? A. In Nevada.

Q. And where was your property located?

A. On the California desert. [144]

Mr. Harrison: I offer this letter of October 22, this letter to Mr. McEan which is also exhibit—

(Testimony of George B. Burnham.)

Mr. Carr: Same objection as made to the previous offers on all phases.

The Court: Same ruling.

(The letter in question was thereupon received in evidence and marked Defendants' Exhibit E.)

Q. (By Mr. Harrison): Mr. Burnham, this letter of October 22, 1923, which the Clerk has just marked as Defendants' Exhibit E, and which was an exhibit to your amended complaint in the suit in Nevada, was mailed about its date to Mr. McEan, was it not?

A. Yes, since this is a certified copy of the documents that accompanied the amended complaint in the Post Office.

Mr. Carr: What was that? I can't hear you, Mr. Burnham.

The Witness: A. This seems to me, as far as I can tell, a copy of my letter.

Q. (By Mr. Harrison): And you signed the letter?

A. I must have.

Q. And then also at the date of that letter the Post Office investigation was in progress?

A. Yes.

Mr. Harrison: I will read one paragraph only from this letter.

Q. By the way, this letter followed an inquiry from Mr. McEan [145] the Post Office Inspector, for a list of your stockholders, did it not?

A. I don't remember.

(Testimony of George B. Burnham.)

Q. Well, will you just glance at it?

A. Yes, I see it does.

Mr. Harrison: Now, I will read this paragraph and Mr. Carr can read anything else he wishes:

“Owing, however, to the present active opposition of parties interested in preventing us from succeeding with our enterprise, we hesitate at this time to furnish anyone other than the Department of the Interior with a list of our stockholders.”

Who were the parties interested in preventing you from succeeding, that you referred to in that letter?

A. I presume that one of them would be our competitors.

Q. The American Trona Company and the Pacific Coast Borax Company?

A. Possibly one or possibly the other.

Mr. Carr: May I have a stipulation or an order that my objection goes to all this line of questioning in reference to the mail fraud, your Honor?

The Court: I don't know what you mean by that.

Mr. Carr: Well, I will object individually and separately, then, if your Honor please.

The Court: You made an objection to the introduction of [146] this letter and I overruled it. I think that would cover what you have in mind. I don't want to rule in the dark.

(Testimony of George B. Burnham.)

Mr. Carr: Very well, I will make my objections separately.

The Court: I think it would be better if you have something special in mind.

Mr. Carr: Very well, I will do so. I just didn't want to keep jumping up here and making objections.

Q. (By Mr. Harrison): Now, you refer in this letter, Mr. Burnham, to the "present active opposition of these parties." What led you to believe, or what had occurred that led you to believe that these parties were actively opposing you at that time? What had they done to lead you to believe that?

A. Well, I had heard through hearsay that American Potash & Chemical Company had ridiculed our process.

Q. Had what?

A. Had ridiculed our process.

Q. Had ridiculed your process?

A. Yes, but I presumed that was just normal competition or what you might call a little ruthless competition.

Q. Didn't you know also and didn't you have in mind when you wrote these letters that you had been discharged by the Pacific Coast Borax Company some years before? A. Yes.

Q. Didn't you, when you were discharged, feel bitter about that? [147]

A. Yes, I was very much disappointed about it.

(Testimony of George B. Burnham.)

Q. Did you feel they had broken faith and they had broken an agreement with you?

A. Yes, I felt they were going to finance my lease at Searles Lake, but they wouldn't do it.

Q. You had felt they had broken faith with you and were untrustworthy because they had broken what you believe was an engagement to finance you, is that correct?

A. But they were willing to enter into an agreement to square things up and that was agreeable to me and so that was all taken care of and settled.

Q. Did you feel dissatisfied after that time in the early 20's when they refused to finance you?

A. As long as they returned to me my process I was satisfied.

Q. So you felt perfectly satisfied about that, did you?

A. I was satisfied——

Q. After they had——

Mr. Carr: Let him finish.

Mr. Harrison: Excuse me.

Q. Go ahead, Mr. Burnham; have you finished?

A. After I had got released from them and they had returned to me my patented process and I was free to go ahead and seek capital to go ahead and develop my lease,—I was satisfied.

Q. I will ask you if you testified on your deposition as follows: (addressing Mr. Carr:) This is on Page 133, Line 15, [148] Mr. Carr:

“Q. How long did you continue to feel bitter about it”

(Testimony of George B. Burnham.)

That was "bitter" about your being discharged by the Pacific Coast Borax Company.

Mr. Carr: There is no such evidence.

Mr. Harrison: He so stated this morning.

Mr. Carr: Pardon me, you asked him and there is no such evidence.

The Court: Let's not argue, gentlemen. If there is an objection, state it, and I will rule.

Mr. Carr: We object on the ground there is no such evidence.

Mr. Harrison: I will withdraw the question and put it in this form:

Q. Did you testify as follows on your deposition:

"Q. How long did you continue to feel bitter about it?

"A. Well, until they returned—until they gave me an absolute cancellation of the agreement and returned to me my process.

"Q. When was that?

"A. About the fall of 1919, or perhaps it was in 1920.

"Q. Well, then, how does it happen that in 1933——"

Mr. Carr: "1923."

Mr. Harrison: Yes, "How does it happen that in 1923 you considered that an act of opposition when they had already [149] recognized your rights?"

(Testimony of George B. Burnham.)

“A. Under our agreement they were to spend money to develop our process—my process, excuse me, and it was our understanding they would finance my lease at Searles Lake, but they refused to go ahead with my agreement and I had to finance the lease myself.”

Q. Did you so testify? A. Yes.

Q. Did you also testify as follows immediately after that:

“Q. And so when you got the letter referred to already, you felt strongly that these competitors would do anything they could to prevent the success of your company?

“A. I felt that the competitors were trying to prevent me from going ahead, but I had no knowledge of, or no definite information on the matter.”

Did you so testify?

A. Yes.

Q. And that was the truth?

A. Yes, I realized that there was competition—keen and severe competition.

Q. As a matter of fact, didn't you in the amended complaint, Mr. Burnham, complain of the acts of the Pacific Coast Borax Company with respect to the financing and the alleged breach of agreement in 1919?

Mr. Carr: Show him the complaint. [150]

Mr. Harrison: Yes, sir.

(Testimony of George B. Burnham.)

Q. I will call your attention to Page 76 of the amended complaint reading as follows:

“On August 25, 1919, the Pacific Coast Borax Company and the Solvay Process Company unlawfully terminated the employment of Mr. Burnham, as hereinbefore stated; but thereafter unlawfully claimed and asserted the right to retain all of the privileges of said contracts, including the right to use the Burnham Solar Process and the restriction upon the right of Mr. Burnham concerning the development of his lease from the Government.”

Mr. Carr: What page and what line?

Mr. Harrison: That is Page 76.

Mr. Carr: What line?

Mr. Harrison: Beginning at Line 3.

“They refused to extend financial aid to Mr. Burnham to develop his lease, or his process, and at the same time precluded him from securing financial assistance elsewhere. The controversy between the parties was adjusted in March, 1920, all of Mr. Burnham's rights restored and all asserted rights released, by the Pacific Coast Borax Company and the Solvay Process Company, as hereinbefore stated.”

Q. You recall that you made that charge in the amended complaint, do you not, Mr. Burnham?

A. Yes. [151]

(Testimony of George B. Burnham.)

Mr. Harrison: I now offer in evidence a letter of October 12, 1923. While Mr. Carr is looking at that, may I see those last exhibits, Mr. Clerk?

The Clerk: Yes.

Q. (By Mr. Harrison): Do you recall on your deposition, Mr. Burnham, you were asked some questions about these letters?

A. I don't recall. What page in the deposition?

Mr. Harrison: Page 131, if you have it there.

Mr. Carr: You'd better take your deposition and look at it, Mr. Burnham—your copy of it.

The Witness: 131?

Mr. Harrison: Yes.

The Witness: Yes, I have it here.

Mr. Harrison: I will ask you if you testified on February 25 of this year with respect to these letters as follows, referring to the language of these letters:

“Q. By ‘competitors’ you again mean the American Potash & Chemical Company and the Pacific Coast Borax Company?

“A. Yes.

“Q. And their associate companies.

“A. And their associate companies, yes.

“Q. All of the people whom you have sued as defendants in the present action?

“A. Yes.

“Q. All of these corporations? [152]

“A. Yes.

“Q. You state here that there was active opposition by your competitors and you state that

(Testimony of George B. Burnham.)

in an affirmative manner. You actively believed then that your competitors were so trying to injure you that you were taking precautions that the list of your stockholders should remain confidential, is that correct?

“A. Well, at no time did we have any concrete information that they were injuring us.

“Q. But your belief and suspicion on that was of long standing?

“A. It was strong enough to prevent us from giving our stockholders’ lists to anybody.

“Q. And that suspicion and belief went back to these dates in 1923?

“A. Yes, but with no absolute knowledge on the subject.”

You so testified, did you not? A. Yes.

Q. And that was the truth? A. Yes.

Mr. Harrison: We offer in evidence this letter of October 12, 1923.

Mr. Carr: Same objection, if your Honor please.

The Court: Same ruling.

Mr. Carr: It was the letter also attached to the amended complaint? [153]

Mr. Harrison: Yes, it is.

(The letter in question was thereupon received in evidence and marked Defendant’s Exhibit F.) [154-A]

Q. This is a letter of October 12, 1923 to Mr. Thomas Varley. Who was Mr. Varley?

(Testimony of George B. Burnham.)

A. Mr. Varley was with the United States Bureau of Mines in Salt Lake City.

Q. He had been delegated, had he not, in connection with the investigation by the Post Office that was being carried on in 1923?

A. He was appointed by the Department of the Interior to make the investigation.

Q. For the Post Office Department.

A. Yes.

Q. You signed that letter and sent it on?

A. Without reading it over, I noticed it is certified to by the clerk, and therefore it must be a true copy of my letter.

Q. I call your attention to this paragraph in the letter to Mr. Varley:

“Our potash and borax competitors do not look with favor upon the position of our making potash and borax at such a low figure. In fact, we have reason to believe that there are influences apparently at work against the development of these Government borax and potash deposits at Searles Lake, which make it exceedingly difficult to finance our enterprise.”

By “our potash and borax competitors” you refer to these defendants, did you not? [154]

A. I presume I had them as some of the people I had in mind, yes.

Q. Whom else did you have in mind except these defendants at that time?

A. There were other producers on Searles Lake.

(Testimony of George B. Burnham.)

Q. Did you have in mind that any other competitors were actively doing anything to injure you?

A. No, I had no knowledge on the subject at all.

Q. Did you suspect that anybody else was doing anything to injure you?

A. Sometimes I wondered.

Q. What other competitor did you suspect was doing anything to injure you?

A. It might have been the West End Chemical Corporation.

Q. Did you suspect that the West End Chemical Corporation had ever exerted any influence against you?

A. I had no knowledge that they had.

Q. Did you ever suspect that they had?

A. I wondered sometimes but what they might.

Q. Did you ever make any charges such as you made against these defendants that the West End Chemical Corporation had used its influence with the Government against you?

A. Well, West End Chemical Company and ourselves had a quarrel one time.

Q. I am not asking you that, Mr. Burnham.

Mr. Carr: That is in answer to the question.

The Court: The answer is not responsive. Read the question.

(Question read.)

A. Did I make any charge? No, I don't think I have ever charged them with influencing the Government against me.

(Testimony of George B. Burnham.)

Q. (By Mr. Harrison): But you did charge these defendants in so influencing the Government in your amended complaint, did you not?

The Court: Doesn't that speak for itself?

Mr. Harrison: It appears from the complaint, if the Court please.

Q. In the last sentence in this paragraph you say,——

“We have reason to believe that there are influences apparently at work against the development of these Government borax and potash deposits at Searles Lake.”

What influences did you have in mind when you made that statement away back in 1923?

A. I don't remember.

Q. The West End Chemical Company was not interested in preventing the development of borax and potash deposits at Searles Lake, was it?

A. They didn't like any more competitors to come into the field.

Q. But they were not interested in preventing the development of borax and potash from Searles Lake; they were themselves in [156] that business of developing borax and potash at Searles Lake, were they not?

Mr. Carr: We object to that as argumentative, in the first place, as to what they were interested in. It is argumentative and immaterial.

The Court: I will overrule the objection.

(Testimony of George B. Burnham.)

The Witness: They were competitors, too, and naturally there was considerable competition.

Q. (By Mr. Harrison): I am asking you this, Mr. Burnham: Isn't it a fact that the West End Chemical Company were themselves producing potash and borax from Searles Lake?

A. They were producing borax, not potash.

Q. Borax from Searles Lake?

A. Yes.

Q. And the Pacific Coast Borax Company was not producing borax from Searles Lake, was it?

A. They had property at Searles Lake.

Q. I am asking you——

A. No, they hadn't yet.

Q. They never did?

A. They made some borax, yes.

Q. They were not at that time producing?

A. Not at that particular time.

Q. They were producing only from their mines, were they not? A. Yes.

A. And the West End Chemical Company, on the other hand, was a [157] company that was developing borax at Searles Lake, isn't that true?

A. Yes.

Q. Now, as a matter of fact, I will ask you to turn to your deposition, Mr. Burnham, at page 134 of that deposition:

“Q. I call your attention to the last paragraph of the first page of that letter——”

Mr. Carr: The letter to Varley.

(Testimony of George B. Burnham.)

Mr. Harrison: Yes, which had been marked by another number in the deposition, and then there is quoted, "Our potash and borax competitors——"

"I will interrupt there, and ask you if those were the American Potash & Chemical Corporation, the Pacific Coast Borax Company, and their associated companies—is that correct?"

A. I presume I had them in mind at the time.

Q. You had no other competitors at that time, did you?

A. Well, yes, there were other competitors. There was the West End Chemical Company.

Q. In 1923?

A. Yes: I think they were producing in 1923.

Mr. Carr: Who was that?

A. The West End Chemical Company.

Q. (By Mr. Lasky): But the ones you were referring to here were the ones I mentioned—the American Potash & [158] Chemical Company and the Pacific Coast Borax Company, and their associated companies?

A. Yes."

Did you so testify on your deposition?

A. That is what I testified. I am not sure that I knew what the original question was.

Mr. Harrison: I ask, if the Court please, that the witness be directed to respond to the question.

The Court: He already answered that he did.

(Testimony of George B. Burnham.)

Mr. Carr: If there is any explanation to make, may he make it, your Honor?

Mr. Harrison: I suggest that that may be made on redirect examination.

The Court: Does the witness wish to correct his answer?

Mr. Carr: No, but the witness always has a right to explain his answer.

The Court: I do not see that a question that asks whether a man testified to anything requires an explanation. Either he did or he did not. The witness has answered.

Q. (By Mr. Harrison): Will you produce your diary for August, 1925? August, 1925 was two months after the Post Office Fraud Order, was it not, Mr. Burnham? A. Yes.

Q. Do you have an entry there for August 23, 1925, referring to the Borax Trust, or referring to any editorials in scientific magazines? [159]

A. This is August 23rd, you say?

Q. 1925, Yes. A. Yes, I have one here.

Q. Will you read that, please, to the jury?

A. There are two. Which one?

Q. May I seem them?

A. Is that the one you have in mind?

Q. I would like that, and I would like whatever else there is on it.

A. This is a quotation:

“In the interest of public welfare he should be exposed and his promotion suppressed. It

(Testimony of George B. Burnham.)

matters not whether he is merely incompetent and deluded or whether he has operated with fraudulent intent. The consequences to industry and the profession are alike disastrous."

The next one?

Q. Is that the finish of the quotation?

A. That is the finish of the quotation, yes.

Q. To whom did you consider that that referred when you copied the quotation?

A. I considered it referred to me, but I am not sure that I had definite proof that it referred to me.

Q. What other entry have you?

A. "Chem. & Met., November 24, 1944." [160]

Mr. Carr: What was the date, Mr. Burnham?

The Witness: November 24, 1924.

Q. (By Mr. Harrison): All right. Will you read?

A. Page 805.

"It is our duty to discourage questionable methods of promotion."

Q. Both of those were quotations from a chemical journal?

A. The second one definitely is. Probably the first one was also.

Q. Have you an entry there with respect to the Borax Trust in connection with that advertisement or that statement? A. No.

Q. Haven't you an entry on August 23rd to the effect that Borax Trust has been advertising with

(Testimony of George B. Burnham.)

them? I may have the date wrong, but you produced that on the deposition.

A. This might be the one you refer to. It was written with hard pencil. It is hard to see.

Q. Yes, that is it. Under what date does that appear?

A. That is a few pages after August 23, 1925.

Q. And the entry was made then in the latter part of 1925 surely, was it not?

A. Probably the latter part of August, 1925.

Q. 1925? A. Yes.

Q. Will you read to the jury just what appears there? [161]

A. "See Hawley in L. A. Real—R-e-a-l—I am spelling a word—Chem. & Met. cost more to print and publish sub price would pay for and final sn," is the next two letters, "based on adv. Borax Tr been," is the next word, "Adv."

Q. If you will pause just a moment, the entry is, "Borax Tr been adv with them." What was the Tr an abbreviation for?

A. I presume that was an abbreviation for "Trust."

Q. And what was the abbreviation of "adv" for?

A. Advertising.

Q. So you intended to make the entry, "The Borax Trust has been advertising with them," is that correct?

A. That is apparently what this sentence is supposed to mean.

(Testimony of George B. Burnham.)

Q. What did you mean by "them"? The chemical journals to which you referred?

A. These are not my ideas.

Q. But you wrote them, didn't you?

A. Yes, but it was dictated.

Q. Who dictated it? A. An attorney.

Q. What attorney? A. Mr. Cruzan.

Q. He was your attorney at that time?

A. He was one of our attorneys.

Q. Did he inform you that the Borax Trust had been advertising [162] in this chemical journal?

A. He had in mind writing a letter to somebody, and he said, "Now, let's write this letter this way. You put it down." He dictated it and I began to write down his thoughts.

Q. Did he tell you as a fact that the Borax Trust had been writing those chemical journals?

A. He was writing that, I said.

Q. Did you believe what you wrote down there, that the Borax Trust had been advertising with these people?

A. I didn't know whether they had or had not.

Q. You had no idea?

A. I presume Mr. Cruzan had. He was writing the letter, not I.

Q. Did you believe Mr. Cruzan's statement that the Borax Trust had been advertising with these chemical journals at that time?

Mr. Carr: I object to that, your Honor. That is going afield. It is incompetent, irrelevant, and immaterial when he believed these people.

The Court: I will overrule the objection.

(Testimony of George B. Burnham.)

Q. (By Mr. Harrison): Will you answer the question?
A. Will you ask it again?

(Question read.)

A. Well, I assume that Mr. Cruzan knew.

Q. And therefore you believed him?

Mr. Carr: That is argumentative, and we object to that, if your Honor please. It makes no difference whether he believed [163] it or not. That has nothing to do with the establishment of any knowledge of a trust. That has nothing to do with it at all.

The Court: I will overrule the objection.

The Court: Read the question.

(Question read.)

Q. (By Mr. Harrison): That is, you believed Mr. Cruzan?

Mr. Carr: We renew our objection to that question.

A. I might have seen some advertisements, myself, in the papers. I don't recall, though.

Q. (By Mr. Harrison): Mr. Burnham, I do not like to repeat a question, but I have asked you two or three times did you believe the statement you wrote in your diary at that time that the Borax Trust was advertising with these chemical journals?

A. I presume I did, yes.

Q. What did you mean by the Borax Trust when you wrote it down in your memorandum?

A. Well, it was Mr. Cruzan who used the words. I didn't use them.

(Testimony of George B. Burnham.)

Q. How did you understand those words when you wrote them in your diary, Mr. Burnham?

Mr. Carr: We renew our objection, if your Honor please. Wait a minute, Mr. Burnham, until I can make my objection.

The Court: The objection is overruled. [164]

A. Well, that was the colloquial expression of the two English-owned companies. That colloquial expression applied to the two English-owned companies who dominated the borax industry.

Q. (By Mr. Harrison): And they were the two defendants in this case, were they not?

A. Yes.

Q. And when you used the term "Borax Trust" you meant the American Potash & Chemical Corporation and the Pacific Coast Borax Company, did you not?

A. That was what Mr. Cruzan meant.

Q. And that is what you meant when you used the term, too, did you not? A. Yes.

Mr. Carr: He did not use the term.

Mr. Harrison: He did on many occasions.

The Court: Let us not argue about it.

Q. (By Mr. Harrison): What is the next entry?

The Court: I think we had better take the noon recess at this time. Ladies and gentlemen of the jury, we will recess until two o'clock. Please bear in mind the admonition the court has heretofore given you.

(A recess was taken until two o'clock p.m.)

Afternoon Session, March 28, 1947

2:00 o'Clock P.M.

Mr. Carr: Mr. Burnham, will you take the stand, please?

GEORGE B. BURNHAM

recalled.

Cross-Examination

(Resumed)

Mr. Harrison: Shall I proceed, your Honor?

The Court: Yes.

Q. (By Mr. Harrison): This morning, Mr. Burnham, when the Court adjourned, we were reading an entry from your diary which began: "Borax Trust been advertising with them."

Will you find that, please, and read the rest of the entry?

A. Yes, the rest of the entry from where I left off reading states as follows:

"Trona Company therefore very s-h-r-e-w."

Q. By writing "Trona Company therefore very s-h-r-e-w," you meant to indicate "Trona Company therefore very shrewd," did you not?

A. Well, I was writing pretty fast. Mr. Cruzan was dictating and I probably never finished writing the word or never finished the sentence.

Q. But immediately following the item, "Borax Trust been advertising with them," what you intended to write was "Trona [166] Company therefore very shrewd"?

A. I don't know.

(Testimony of George B. Burnham.)

Q. What is your best judgment as to what you meant by the word "s-h-r-e-w"?

A. The sentence might be considerably longer—I don't know. That word evidently was not finished.

Q. What is the next line?

A. The next line is, "Ask him to write to find out who was member of staff".

Then down below it says, "P.C.B. and Smith".

Q. Do you know what was intended to be meant there by the memorandum, "Ask him to find out who was member of staff"?

A. It reads, "Ask him to find out who was member of staff," yes.

Q. Were you making a memorandum of some suggestion that a letter be written to find out who was a member of this staff of the newspaper in which the editorial appeared?

A. I don't remember the details except Mr. Cruzan was turning over in his mind a letter to write to someone and I was taking it from his dictation and the whole plan of the letter was never finished, or never carried out.

Q. You have no idea as to what was meant by that last sentence?

A. No precise idea.

Q. Have you any general idea?

A. I could guess. [167]

Mr. Carr: Well, don't guess.

Q. (By Mr. Harrison): Unless you have some recollection, I don't want you to guess.

A. No, I have no recollection.

(Testimony of George B. Burnham.)

Q. You have no recollection at all?

A. No.

Q. Will you turn to your copy of the affidavit filed in this case on February 21, 1946, the printed copy of your affidavit? A. Yes.

Q. On the second page in the amended complaint—do you have the affidavit there?

A. You mean in the present suit?

Q. Yes, the present suit.

A. Yes, I have it here.

Q. All right, if you will turn to the second page, please, you will notice under the next amended complaint in the Post Office fraud order a paragraph which begins on the second page about the middle of the second printed page? A. Yes.

Q. And that refers to the amended complaint filed on April 6, 1926? A. Yes.

Q. In the suit against the Postmaster?

A. Yes.

Q. That being the amended complaint that has been introduced [168] in evidence in this case, is that correct? A. That's right.

Q. And it refers to the claim that certain defamatory propaganda by the Borax Trust influenced Dr. Stewart. Now, I am calling your particular attention to this statement in your affidavit, toward the end of the paragraph:

“Said plaintiff subsequently gained information tending to prove said allegation to be correct.”

(Testimony of George B. Burnham.)

Will you state what information you referred to as the information which you subsequently gained which tended to prove the allegation to be correct?

A. Well, the letter that Stephen Mather wrote to Mr. Whitney would be one.

Q. Well, that was some of the information to which you referred here?

A. Yes, some of the information.

Q. And that was the letter from Stephen Mather to C. W. Whitney? A. Yes.

Q. Who is Mr. Whitney?

A. Mr. Whitney was the director and officer of the Burnham Chemical Company.

Q. The plaintiff company? A. Yes.

Q. Will you produce, please, that letter?

A. I gave the photostatic copy to you at the deposition. [169]

Q. Was that produced in the deposition? Have you now the copy you kept in the safe deposit box through the years?

A. Not with me. I am pretty sure I gave it to you in the deposition, or to Mr. Lasky.

Q. I show you now this paper which was offered in evidence in connection with the deposition and ask you whether it is the Mather letter to which you referred? A. Yes, it is.

Mr. Harrison: We offer it in evidence, if the Court please.

Mr. Carr: What is it?

Mr. Harrison: This is the letter from Stephen

(Testimony of George B. Burnham.)

T. Mather to Clarence W. Whitney, dated October 8, 1926.

(The letter in question was thereupon received in evidence and marked Defendants' G.)

Mr. Harrison: This, ladies and gentlemen of the jury, is a letter on the letterhead of the United States Department of the Interior, National Park Service, Grand Canyon National Park, Grand Canyon, Arizona, Office of the Superintendent at Grand Canyon National Park, dated October 8, 1926, addressed to Mr. Clarence W. Whitney at 433 California Street, San Francisco, California:

“Dear Clarence:

“I have your note of July 27, and tried to arrange to connect up with you, but was so busy I could [170] not accomplish it.

I do not see very well how I could possibly interest myself in the Burnham Chemical Company, particularly as I was responsible in a measure for having the fraud order issued against Burnham himself in connection with his indiscriminate efforts to sell his stock to men, women and children all over the world. If you are familiar with all his methods in Reno; how the bankers there compelled him to turn over to them a mass of circulars in which he had used their names without their consent, I do not believe you would be so enthusiastic about the proposition. The process

(Testimony of George B. Burnham.)

may be all right and if he had stuck to this, no one could have raised a question, but the bulk of his time seems to have been spent in raising money from the type of people who could little afford to take the kind of a chance he had to offer. I know of one case, of a woman stenographer with a small income in Chicago, who received his alleged newspaper both at her home and office. He certainly had a remarkable list to draw on, as I have found his circulars all the way from Montana to London.

Borax is now selling at about $3\frac{3}{4}$ c a pound delivered in the East, and if you can show me how millions can be obtained on this price for a product the total sales of which are not much over seventy-five to one hundred thousand tons the country over, you are a better mathematician than I am. [171]

Very sincerely yours,
Stephen T. Mather''

Q. Now, you learned about that letter shortly after its receipt in October, 1926, did you not, Mr. Burnham? A. Yes.

Q. Mr. Whitney gave you a copy of it, or you took a copy of it?

A. Mr. Whitney showed me the letter.

Q. Mr. Whitney showed you the original letter?

A. Yes.

Q. Did you have a photostat made of the letter?

A. Later on I did.

(Testimony of George B. Burnham.)

Q. How much later on?

A. Oh, several years later.

Q. You had it photostated and you had the photostat put in a safe deposit box, did you not?

A. Yes.

Q. And you kept it in the safe deposit box for a period of years, did you not?

A. The company did.

Q. In the company safe deposit box?

A. Yes.

Q. You considered that a letter of some considerable importance, did you not? [172]

A. Yes.

Q. Now, Mr. Mather at this time occupied what position?

A. He was president of the Stirling Borax Company and also head of the National Park Service of the Department of the Interior.

Q. Is he the person who is referred to in the clause of the complaint in this action where you allege that "said fraud order was brought about largely through protest and demand of a highly-placed Federal Government representative who formerly had been, prior to his appointment to such position the Chicago manager and representative of defendant Pacific Borax Company, that at the time of making said protest said official was the president of the defendant Stirling Borax Company. Plaintiff is informed and believes and therefore alleges that said activities on the part of said Government official were done on behalf of said

(Testimony of George B. Burnham.)

defendants herein and in furtherance of said combination and conspiracy and for the purpose of hindering and the preventing, if possible, the carrying out of plaintiff's operations under said lease."

Is he the person referred to in that allegation of the complaint?

A. The complaint in this action?

Q. Yes. A. Yes, he is.

Q. Now, then, let me call your attention also to your letter [173] to the Secretary of the Department of the Interior on November 18, 1939. Have you a copy of that handy?

A. I have a copy, but it is not a complete copy.

Q. In what respect?

A. Because the letter of Mr. Mather has gotten loose from this letter. It was attached to this, but has come off.

Q. But aside from the copy of the letter of Mr. Mather, the copy you hold in your hand is a correct copy of the letter you wrote to the Secretary of the Interior? A. Yes.

Q. Have you the original office copy of that? I think it was returned to you in the deposition.

A. Yes, this is the original office copy, but there is another one, I believe, in better shape than that.

Q. Well, this is clear enough.

Mr. Harrison: We offer that in evidence, if the Court please. Mr. Carr, are you familiar with this?

Mr. Carr: Yes, but I ask you to read it to the jury.

(Testimony of George B. Burnham.)

Mr. Harrison: Yes, I will. We offer this as Defendants' Exhibit next in order.

(The letter in question was thereupon received in evidence and marked Defendants' Exhibit H.)

The Witness: That is not complete, because it doesn't have Mr. Mather's letter attached to it.

Q. (By Mr. Harrison): But it is complete except for the copy [174] of Mr. Mather's letter?

A. And a notation that was written underneath Mr. Mather's letter which explained some things in Mr. Mather's letter which were not true and that all went to the Secretary of the Interior.

Q. In any case, as far as the body of the letter is concerned, it is a true copy of what you wrote to the Secretary of the Interior at that time?

A. Yes.

Mr. Harrison: Do you wish me to read this whole letter?

Mr. Carr: Yes, I wish you would read this whole letter, if you please.

Mr. Harrison: (Reading):

“Washington, D. C.
November 18, 1939.

“Secretary of the Interior,
Washington, D. C.
Sir:

I understand that the American Potash & Chemical Corporation of Trona, California, has

(Testimony of George B. Burnham.)

applied for leases on potash lands in the Searles Lake Potash Reserve in addition to 3319 acres of patented land which they already own. Its application for leases was made as a result of bids which the Commissioner of the General Lands Office advertised for releasing of the Searles Lake Potash [175] Reserve under date of August 22, 1939. It is my understanding that two companies have placed bids, namely, the West End Chemical Company and the American Potash & Chemical Company, which are the two companies now operating at Searles Lake and practically the remaining portion of lands available at Searles Lake will probably be given to these two bidders."

I am suggesting, if the Court please, since this is a long letter, although I am perfectly willing to read it all, I wish only to address the attention of the witness to certain small portions of this.

The Court: Read whatever parts you want; if counsel on the other side wants to read in any or all parts of it, he may do so later.

Mr. Harrison: Very well.

Q. Now, I want to call your attention particularly to this passage in this letter, Mr. Burnham, which reads as follows:

"We believe that it was the influence of foreign-owned interests in the halls of government which was behind all of the difficulties of the Burnham Chemical Co. in the development of

(Testimony of George B. Burnham.)

this potash lease at Searles Lake. The reasons we are led to believe this are as follows: Stephen T. Mather was the one-time Chicago manager of the Pacific Coast Borax Company and was assistant to the Secretary of the Interior from 1915 to 1917 and was a [176] Director of the National Park Service of the Department of the Interior from May 16, 1917, up until the time of his death about 1930 (See *Who's Who in America* 1926). While he held this high government position he was also Vice-President of the Stirling Borax Company which is a subsidiary of Pacific Coast Borax Company, a foreign-owned enterprise. Stephen T. Mather admits that he was in a measure responsible for the Post Office fraud order being issued against the Burnham Chemical Company in a letter dated October 8, 1926, written to Clarence Whitney, one of the directors of the Burnham Chemical Company. A copy of his letter is enclosed."

Then, further down on the same page:

"Mr. Mather himself admits the process may be all right and the foreign-owned Borax Trust itself endorses the process. And so they were afraid we would be a formidable competitor and Mr. Mather informed the Post Office to issue a fraud order so we could not raise funds. Mr. Mather was a high Government official and also an officer and stockholder in the British-owned Borax Trust."

(Testimony of George B. Burnham.)

I should like to ask you, Mr. Burnham——

Mr. Carr: Now, may I read the balance of the letter?

Mr. Harrison: It interrupts the examination.

The Court: You can read it at a later time, but Counsel has a right to pursue his examination the way he wants to. [177]

Mr. Carr: But if they offer the letter we have a right to read the whole letter and not have just a part of it read, as was done by them. At this time I would like to read the whole letter.

Mr. Harrison: It was your Honor's ruling that I could read whatever part I wanted and Counsel could read whatever part he wanted.

The Court: You can read whatever you want, but I am not going to restrict Mr. Harrison or you, Mr. Carr, from pursuing the interrogation of witnesses in whatever way you want to do it. If Counsel only wants to read part of the letter in connection with this examination, he may do so. If you wish to read other parts or all of the letter at a later time, you may do so, but not at this time and interrupt the examination of Mr. Harrison. That would be a waste of time.

Mr. Carr: It is not a waste of time.

The Court: I don't want to argue with you, but you can read the whole or any part of it at a later time.

Mr. Carr: Very well, your Honor.

Q. (By Mr. Harrison): Mr. Burnham, you refer to an admission by Mr. Mather that he was

(Testimony of George B. Burnham.)

an inspector for the Post Office. In making that reference, you referred to this letter of October 8, 1926, which has been introduced in evidence here?

A. Yes.

Q. In referring to Mr. Mather's admission that the process may [178] be all right, you were referring to a statement in that letter, were you not?

A. Yes.

Q. You never had any talk with Mr. Mather on that subject?

A. No, but Mr. Whitney, one of our directors, did.

Q. All right, we will come to that, then. This was in 1926 in October that you learned about this letter, was it not? A. Yes, October, 1926.

Q. Following the April in which you filed the amended complaint of Carson City?

A. That's correct.

Q. Now, then, in 1927, did Mr. Whitney report to you that he had called on Mr. Mather?

A. That he had seen Mr. Mather, yes.

Q. And did he report to you that he had talked with him about this letter, or about the subject matter of the letter? A. Yes.

Q. And isn't it a fact that as a result of that talk and a result of Mr. Whitney's report to you neither he was satisfied nor were you?

A. No, Mr. Whitney was satisfied, then.

Q. Were you satisfied?

A. Yes, with what Mr. Whitney said regarding his conversation with Mr. Mather.

(Testimony of George B. Burnham.)

Q. Now I will ask you, Mr. Burnham, if upon your deposition, [179] and this is Page 518, Mr. Carr, on March 15 of this year you were not asked the following questions and gave the following answers:

Q. This begins at page 517, line 25:

“Q. Who was it you talked to in March, 1927?

A. Well, now, that was right shortly after Mather had written his letter of October 8, 1926, or that was just a few months later, and that might have been the time when Mr. Whitney saw Mr. Mather in San Francisco, here, and had a talk with him.

Q. Were you present?

A. No.

Q. Was the conversation reported to you by Whitney?

A. No.

Q. How do you know what happened then?

A. I think he did, come to think about it, give me some account of the fact that he had talked to Mather, and the opinion was that Mather was acting in the interests of the Government.

Q. You say ‘the opinion’—whose opinion?

A. Mr. Whitney’s talk to us was to that effect, as I remember, but I really don’t recall precisely what Whitney said.

Q. But any way it was after that interview

(Testimony of George B. Burnham.)

in San Francisco that Whitney wrote the letter you are going to look for?

A. Yes. Mr. Whitney wasn't satisfied with the conversation with Mr. Mather in March, 1927.

Q. Nor were you? [180]

A. Nor was I; and so we decided to try to see Mr. Mather again. That was it."

Did you so testify?

A. Yes, but there are two long intervals of time between the time when we decided to see Mr. Mather again. Between that interval of time the cut in the price of borax occurred.

Mr. Harrison: I object, if the Court please, on the ground it is not responsive.

The Court: Yes, I will sustain the objection. Strike out the answer.

Q. (By Mr. Harrison): At any rate, there was that call in March, 1927, or that meeting between Whitney and Mather, was there not? A. Yes.

Q. Do you recall the fact that in 1929 Mr. Whitney wrote upon the stationery of the company as an officer of the company a letter to Mr. Mather, asking to see your company attorney, Mr. Townsend?

A. Yes, that was in March, 1929, wasn't it?

Q. I think it was in January. Have you the letter? That is the letter Mr. Whitney wrote to Mr. Mather with respect to Mr. Townsend, and the letter which he wrote to Mr. Townsend. It does

(Testimony of George B. Burnham.)

not seem to be in the exhibit file for the deposition.

A. Oh, yes, that was January 28, 1929.

Q. You have produced a copy of a letter which Mr. Whitney [181] wrote Mr. Mather on January 28, 1929, and it is a fact, is it not, that you were familiar with the letter at the time that it was sent?

A. Shortly afterward.

Q. You knew about it about that time, and that was accompanied by a letter to Mr. Townsend in Chicago? A. Yes.

Q. Did you notice that? A. Yes.

Q. Mr. Townsend was in Chicago at that time, and is this a copy of a letter that went from the company office by Mr. Whitney on January 28, 1929, to Mr. Townsend?

A. Yes, that is a copy.

Mr. Harrison: We offer this letter, from Mr. Whitney to Mr. Townsend, dated January 28, 1929, in evidence, if the Court please, as Defendants' Exhibit next in order.

(The document in question was thereupon received in evidence, marked Defendants' Exhibit I, and read by Mr. Harrison as follows:)

Mr. Harrison: This is a letter to Mr. B. D. Townsend, Blackstone Hotel, Chicago, Illinois.

"My dear Mr. Townsend:

Your letter of January 24th awaited me upon my return from Del Monte.

In accordance with your suggestion I enclose herewith [182] a letter of introduction to

(Testimony of George B. Burnham.)

Stephen T. Mather, which I trust you will find satisfactory. You probably could get information as to his physical condition by inquiring at his office—111 West Monroe Street—or at the office of the Sigma Chi Fraternity, 114 East Jackson Boulevard. C. W. Cleveland or Roy C. Hecox at that address could give you information regarding him. It might possibly be best, however, to call up Ralph F. Potter, 209 South LaSalle Street, who is an attorney and a personal friend of mine, who is also a fraternity brother. Instead of sending you the original letter by Mr. Mather and running the risk of its loss in the mail, I am sending you a photostat copy of it.”

Q. Now you noted that clause in the letter, did you not? A. Yes.

Q. You knew that Mr. Whitney was taking particular care of the original of that letter?

A. Yes.

Q. You had, as I understand it, a photostat made and put in the safe deposit box belonging to the company? A. Yes.

Q. That was because you considered the letter of some importance, did you not? A. Yes.

Mr. Carr: Asked and answered.

The Court: Yes. [183]

Q. (By Mr. Harrison): Will you produce your diary for May 9, 1929? A. Yes.

Q. Is there a note on May 9, 1929, with respect to the Stirling Borax Company? A. Yes.

(Testimony of George B. Burnham.)

Q. And how does that entry read?

A. "Called on H. I. Smith May 9th." Was that the date?

Q. Yes. I was not referring to that particular memorandum. I have no objection to it. I can point out what we are interested in: "Have de Witt——"

A. Yes, further down. "Have de Witt see Borax Smith and find out just what Mather's connection is with P.C.B. Company."

Q. Who was Mr. De Witt?

A. He was one of our directors.

Q. One of your directors, and you made the note at that time to remind you to have Mr. de Witt find out that fact? A. Yes.

Q. Mr. Townsend reported he had not been able to see Mr. Mather in January, 1929, did he?

A. That is right.

Q. And this conversation occurred, according to your testimony, with Mr. Zabriskie on May 17, 1929?

A. Yes.

Q. In his office? [184] A. Yes.

Q. And as soon as you went into that office you saw the picture of Stephen T. Mather on the wall, did you not?

A. Yes, and I asked him some questions about Mather.

Q. Did that make quite an impression on you when you saw the picture on the wall?

A. I was impressed by that picture, yes.

(Testimony of George B. Burnham.)

Q. Why did it make an impression on you?

A. Because Mr. Mather had written us a letter, that letter of October 8, 1928. I realized also that Mr. Mather and Mr. Zabriskie were probably friends.

Q. Because the picture was there?

A. Yes.

Q. Was there any other reason why that made an impression on you when you saw that picture of Mr. Mather on Mr. Zabriskie's wall?

A. That was one of the reasons why I asked Mr. Zabriskie if Mr. Mather had any stock in the Pacific Coast Borax Company.

Q. I am asking you now if there was any other reason, Mr. Bernham, why the picture of Mather made an impression on you before you spoke to Zabriskie about it?

A. I don't remember any other except those two.

Q. Isn't it true that it made an impression on you because you suspected that he was largely responsible for the Post Office Fraud Order, and because you suspected that he was doing that to help your competitors and injure your company, [185] rather than because of his Government position?

A. Well, I had no knowledge at all that he was plotting with our competitors. That is why I asked Mr. Zabriskie the questions that I asked him.

Q. I would like to have you consider my ques-

(Testimony of George B. Burnham.)

tion again. Will you read the question, Mr. Reporter?

(The last question was read by the reporter.)

A. That is two questions. I can't answer two questions with one answer.

Q. Can you answer the question whether it made an impression on you because he had written a letter stating that he was responsible in a measure for the Post Office Fraud Order? A. Yes.

Q. Did it also make an impression on you because you were suspicious that he had done that for the purpose of helping your competitors, rather than because of his position as a Government official?

A. I was a little bit suspicious about it, but I had no knowledge.

Q. You were, however, suspicious?

A. Yes, and that is why I called on Zabriskie.

Q. No, what I am talking about is your suspicion with respect to Mather's act, not about your suspicion in any other respect. You did not know anything about Mather's picture before you called on Zabriskie, did you? A. No. [186]

Q. What was your suspicion about Zabriskie when you were talking to Mather? Was it a suspicion that he had induced this fraud order or brought it about for the purpose of helping your competitors and injuring you, and not for the purpose of performing his duties as a Government official?

(Testimony of George B. Burnham.)

A. I wanted to know whether he did it for the Government or whether he did it for the Stirling Borax Company. That was in my mind.

Q. Was it your suspicion that he was doing it in order to injure you and to help your competitors?

A. Not necessarily the competitors, no. I had no knowledge that he was doing things concertedly with my competitors.

Q. I will now ask you, Mr. Burnham, whether or not at this deposition, page 31, Mr. Carr, line 14, you gave the following testimony:

“Q. And when you talked to Mr. Zabriskie you believed that Stephen Mather was responsible for getting that fraud order issued?

A. I was suspicious that he may have had, that he was doing it for the purpose of helping our competitors rather than because of his position as a Government official.”

Q. Did you so testify?

A. Whereabouts is that?

Q. That is from lines 14 to 20 on page 31.

A. Yes, that is what I testified. [187]

Q. Now, in any of your conversations with Mr. Zabriskie on that day, Mr. Burnham, did you say a word to him about the fraud order?

A. No, but I did ask him a pertinent question.

Q. The question is whether you mentioned the Post Office Fraud Order.

The Court: He said no.

The Witness: No.

(Testimony of George B. Burnham.)

Q. (By Mr. Harrison): Did you mention to him the Mather letter in which Mr. Mather assumed responsibility in part at least for the fraud order?

A. Well, I didn't mention the Mather letter, no.

Q. Did you ever see Mr. Zabriskie again after that meeting of May 17, 1929? A. No.

Q. Did you make further efforts to see Mr. Mather? A. Yes.

Q. Isn't it true that later in the same month of May, 1929, on your return trip west, you made an effort to see Mr. Mather, you and Mr. Whitney?

A. Yes.

Q. For what purpose did you call on Mr. Mather or endeavor to see Mr. Mather at that time?

A. Well, after Mr. Whitney's conference with Mr. Mather in 1927 we were pretty well satisfied with Mr. Mather's explanation [188] of his letter, but when a couple of years later the price war occurred and we were forced out of the borax business, my suspicions were aroused again, and I began to question whether Mr. Mather's letter really—explanation of his letter was really satisfactory. So since Mr. Whitney was going to Michigan, and I was on my way back to California, we decided to meet in Chicago and see Mr. Mather in Chicago, because that is where he lived.

Q. For what purpose?

A. To talk with him about his letter again.

Q. And see whether or not he had some ulterior motive? A. Yes.

(Testimony of George B. Burnham.)

Q. And your suspicions had become aroused at that time again, had they not?

A. Yes, because of the price cut in borax.

Q. And that effort to see Mr. Mather occurred on May 31, 1929, did it not? A. Yes.

Q. That was about two weeks after the conversation with Zabriskie and Emlaw, was it not?

A. Yes, but we had already made our plans to meet in Chicago before I saw him.

Mr. Harrison: I move to strike out "made our plans." The question was, Was it two weeks later?

The Court: I will grant your motion. It will go out. [189]

Q. (By Mr. Harrison): Before we leave the matter of this Zabriskie conversation with respect to Mather, I would like to read you certain testimony that you gave on page 32, Mr. Burnham, from lines 1 to 15, and ask you if you gave this testimony recently. A. Page 32?

Q. Yes. A. What line?

Q. Line 1 to 15:

"Q. And you believed at the time you talked to Mr. Zabriskie that Mr. Mather's reason for getting that fraud order issued was to injure the Burnham Chemical Company, in order to benefit its competitors, Pacific Coast Borax Company, and American Potash & Chemical Corporation; do I understand you correctly?

A. I imagine that was what Mr. Mather, the reason why Mr. Mather caused the fraud

(Testimony of George B. Burnham.)

order. I imagine the reason he did it was to help our competitors get rid of us.

Q. Was that what you believed at the time you talked to Zabriskie? I am trying to get your state of mind then. You said you were very much impressed by the fact that his picture was on the wall. Was that why you were much impressed by it?

A. Yes.

Q. Because at that time you had that belief in your mind? [190]

A. That is right."

Did you so testify, Mr. Burnham?

A. Yes.

Q. You kept that letter from Mr. Mather to Mr. Whitney in your safe deposit box for many years, did you not? A. Yes.

Q. Do you recall the fact that when you went East in 1934 you took that letter with you?

A. No, I do not recall that I did.

Q. Will you please look at your dairy entry for June 30, 1934, made under that date? You have a memorandum, have you not, of a conversation you had with your lawyer, Mr. Townsend?

A. Yes.

Q. Will you read that memorandum to the jury?

A. All right.

Mr. Carr: We object to that—I will withdraw the objection.

A. "Senator Wagner"—it starts out—"advocates redistribution of wealth. Senator Nye fight-

(Testimony of George B. Burnham.)

ing the administration. July 30, 1934. Discussion with B. D. Townsend, Kramer case. Suit against Pacific Coast Borax Company for the patented land, claiming it is held in trust for us. Replacement theory of P.C.B. knocked out."

Q. (By Mr. Harrison): And then you have some geological matters there, do you not?

A. "Take a set of all documents to Washington, D. C. Look in [191] bank vault for the Mather letter, B. C. Company vault, or G. V. A. Townsend said would use Mather letter."

Q. Would use, or could use?

A. Could use the Mather letter.

Q. That is all I am interested in at the present time. We will come back to that later. Refreshing your recollection by that memorandum, it is a fact that you were discussing with Mr. Townsend on that day, July 30, 1944, your suspicions with respect to these defendants, isn't that true? A. Yes.

Q. On that occasion you were discussing a plan to go East, to Washington, or New York?

A. Yes.

Q. On that occasion Mr. Townsend advised you to take a set of all documents and to look into the bank deposit vault for the Mather letter?

A. That particular sentence about looking in the bank vault was probably my own idea, not Townsend's.

Q. So that you made that memorandum so you would not forget to look in the bank deposit vault for the Mather letter? A. Yes.

(Testimony of George B. Burnham.)

Q. But Mr. Townsend did say that in connection with the suspicions you entertained about these companies you might be able to use and could use the Mather letter? A. Yes.

Q. And both you and he considered it a matter of importance, did you not? [192] A. Yes.

Q. Did you consider it as a matter of importance as being evidence of an intent to injure the plaintiff?

A. Yes, by the Stirling Borax Company, but not necessarily by the others.

Q. Did you think it might be some evidence of a conspiracy?

A. No, I had no knowledge or evidence or thought regarding a conspiracy.

Q. You did not have any thought that that letter might help you to show a conspiracy between American Potash and Pacific Coast Borax?

A. No.

Q. Then I would like you to turn to page 263 of the deposition, and I will ask you if you testified as I shall now read.

A. What page is that?

Q. 263, line 8, or I will begin to read from line 2 on page 263, and ask you if you testified as follows:

“Q. What did he tell you?

A. In other words, I remember asking Townsend, ‘Shall I use the Stephen Mather letter if I have to?’ And he said, ‘Yes, if you feel it is going to help your cause along, go

(Testimony of George B. Burnham.)

ahead and use the Stephen Mather letter,' and that was the first time he had ever decided to do that.

Q. Did he tell you in what way the Stephen Mather letter [193] could be of use to you? You must have discussed it there, did you not?

A. Yes, our suspicions had been aroused again that the competitors, that the Pacific Coast Borax Company at least, might be violating some antitrust laws, and if I needed Stephen Mather's letter as substantial evidence to prove any such violation or to give any of the Government officials as additional information to help them to decide whether there was any law being violated, why, to go ahead then and use it.

Q. In other words, both you and he felt at that time that the Stephen Mather letter was some evidence that the Pacific Coast Borax Company was out to injure your company and had been responsible for the Post Office Fraud Order, and was responsible for other acts injuring the Burnham Chemical Company?

A. We had no knowledge of that, but we began to think that maybe there was some connecting link.

Q. My question was in regard to your knowledge. You and Townsend both thought that the Stephen Mather letter was some evidence to support a charge?

Mr. Carr: Might be.

(Testimony of George B. Burnham.)

A. Might be some evidence.

Mr. Lasky: (Continuing) — to support that charge of conspiracy between the Pacific Coast Borax Company [194] and the American Potash & Chemical Company to injure your company?

A. That is right, that it might be some evidence.

Q. Mather was dead at that time, wasn't he?

A. Yes.

Q. You first decided to use Mather's letter after he was dead?

A. Well, in fairness to Stephen Mather we had made many attempts to see him while he was living to discuss that letter with him, but we were always unsuccessful in those attempts."

Did you so testify?

A. Yes, but that is not the right inference. You ask an awful long question there.

The Court: No, the trouble is with this type of examination the witness wants to make explanations, and it takes too long when we get into that. The only question before you is whether or not you gave some testimony.

The Witness: Yes, I gave that testimony.

The Court: Your attorney can bring out other matters if he wishes to on his examination.

The Witness: Yes, your Honor.

Q. (By Mr. Harrison): Now, then, in Septem-

(Testimony of George B. Burnham.)

ber, 1939, you started East again, did you not, on another trip? A. Yes.

Q. That was in connection with a hearing about the Little Placer [195] property, was it not?

A. That is right.

Q. When you went East on that trip you took the Mather letter with you because you considered it important, did you not?

A. Yes, but that, again, infers that I took the Mather letter in 1934.

Q. Well, let me ask you, you and Mr. Townsend had discussed the matter of making it?

A. Yes.

Q. Do you know whether you did in fact take it?

A. I don't remember if I did. I don't think I did.

Q. But you made a memorandum in your book to get it out of the safe deposit box? A. Yes.

Q. You do not remember whether you did, or not?

A. I am pretty sure I did not. I can't quite——

Q. You do not remember one way or the other, but you do remember that you took it back because you considered it a matter of importance in September, 1939? A. That is right.

Q. With respect to the matter of the price cuts that have been referred to, the fact is the price cuts occurred in the month of June, 1928, in the price of borax, did they not? A. Yes.

Q. How much did those price cuts amount to?

A. Well, it amounts to a cut in the price of

(Testimony of George B. Burnham.)

borax of one-half when figured at the plant, f.o.b.

Q. One-half the previous price? A. Yes.

Q. It dropped suddenly in June? A. Yes.

Q. And continued to drop through the year?

A. Yes.

Q. And it reached an all-time low, did it not?

A. Yes.

Q. And what was that?

A. About \$13 a ton in bulk f.o.b. Searles Lake.

Q. Now, then, what had been the price in prior years? Had it ever gone much below \$50 a ton?

A. Never had that I know of.

Q. So here was a break such as never had occurred before, is that true?

A. Not all at once, but half of it occurred in one month's time.

Q. A break to that extent had never occurred before, had it? A. Not to my knowledge.

Q. Not for many years, is that true?

A. That is correct.

Q. And it occurred in the very month when you were beginning production at the Burnham plant, did it not? A. Yes. [197]

Q. And it was simultaneously by the American Potash & Chemical Company and the Pacific Coast Borax Company?

A. I am not so sure simultaneously, but during the month the two of them came down.

Q. Wasn't it substantially simultaneously?

A. Within the month, yes.

(Testimony of George B. Burnham.)

Q. You do not mean to say one of them cut the price in half and the other one did not?

A. Well, the prices tumbled between the two.

Q. We will say the prices of both tumbled in June.

A. Yes.

Q. There is no doubt about that, is there?

A. That is right.

Q. And you were following the situation very closely?

A. Yes.

Q. And you knew about it at the time?

A. Yes.

Q. And the effect of the price cut, the fall in prices in 1928 was that you were unable to carry on profitable production at your borax plant, is that true?

A. Yes.

Q. You knew at the time that the fall in prices made production at a profit by you impossible, did you not?

A. Yes.

Q. And you knew your competitors, to wit, the defendants in this case, were being benefited by that circumstance, did you not? [198]

A. I thought they were suffering as bad as we were.

Q. Didn't you consider at that time that they were being benefited by reason of the elimination of your company?

A. In that regard they would benefit.

Q. And you knew that at the time, did you not?

A. Yes.

Q. With respect to that price cut being simultaneous, I will ask you to turn to Page 28 of your

(Testimony of George B. Burnham.)

deposition, if you will, at Line 15. The question is this——

A. Page what?

Q. Page 28, Line 15. The question is, Did you testify as follows in your recent deposition:

“Q. The both of the companies, the Pacific Coast Borax Company and the American Potash & Chemical Company cut their prices at the same time in June, 1928?

A. Yes, the quoted prices in the Chemical Journal show that the cut occurred in June, 1928, and presumably with both companies at the same time.

Q. And you were aware of that fact, were you, at the time it occurred in June, 1928?

A. Oh, yes.

Q. Did you make it a point to follow the market prices of borax?

A. Yes.”

Did you so testify? [199]

A. Yes, but the published prices only came out once a month.

Q. Weren't you observing at that time when you were closing production what was actually happening on the market? You were in charge of the company, were you not?

A. Yes, the prices in the published magazine came out once a month, but we know they were falling continuously during the month of June.

Q. You knew they were falling continuously

(Testimony of George B. Burnham.)

during the month of June on the part of both companies?

A. Yes, we knew that, on the part of both companies, because of our attempts to make sales.

Q. You found that out on your attempts to make sales?

A. Yes, but "simultaneously" is in that month is what I meant.

Q. You did not notice one company dropping far down below the other, did you, at any particular time? A. No.

Q. You at once consulted Mr. Townsend about the cut in price and the effect on your business, did you not? A. Yes.

Q. And Mr. Townsend wrote a letter to a lawyer friend of his in Washington by the name of Hinrichs? A. Yes.

Q. And gave you a copy of that letter?

A. Yes.

Q. Have you that letter, Mr. Burnham? [200]

A. Yes, this is a copy of it.

Q. Mr. Townsend gave you a copy about the time he wrote it? A. Yes.

Q. And you kept the copy ever since, or a copy ever since?

A. Yes, I think your documents have a copy, too.

Q. Yes, it is here, Mr. Burnham. This is a copy which you have kept ever since 1928, of this letter from Townsend to Hinrichs, is it? A. Yes.

Q. At about this time you were discussing with

(Testimony of George B. Burnham.)

Mr. Townsend the question of your remedy as a result of what happened, were you not?

A. Yes.

Mr. Carr: What was the date of that?

Mr. Harrison: July 26, 1928.

Mr. Carr: Thank you.

Mr. Harrison: We offer the document in evidence as the defendants' exhibit next in order.

(The letter in question was thereupon received in evidence and marked Defendants' Exhibit J.)

Mr. Harrison: This is a letter dated July 26, 1928, to Mr. H. Stanley Hinrichs, c/o Bright, Thompson & Hinrichs, Southern Bldg., Washington, D. C., which reads as follows: [201]

“July 26, 1928.

“Mr. H. Stanley Hinrichs,
c/o Bright, Thompson & Hinrichs
Southern Bldg.
Washington, D. C.

My Dear Stanley:

It has been some time since I have written to you. I had hoped that I would return to Washington last Spring, but it became impossible. I have made my plans to present that matter early during the next session of Congress.

A condition has arisen in the borax industry, con-

(Testimony of George B. Burnham.)

cerning which I may be asked to render an opinion upon the following question:

If two concerns already in control of the borax market, not only in the United States but in the whole world, engage in a price war, by selling at prices which preclude any profit, and the immediate effect of which will be to kill off the only potential competitors; is the transaction one which may properly be made the subject of action by the Federal Trade Commission, under the 'unfair competition' clause (Section 5) of the Federal Trade Commission Act?

There are other features of the transaction which might strengthen the case. For example, I am inclined to think that the present competition, although very bitter in form, [202] and apparently in earnest, is in fact designed by the controlling heads of these two concerns (and which are located in England) for the express purpose of killing off threatened competition, although their subordinates may not really know that to be the fact. But this would be very difficult to prove, even if true. Therefore, in stating the question, I have purposely limited it to a question whether the transaction would constitute 'unfair competition' if the practical effect of it was to drive out competitors, even though the evidence does not prove that those engaged in the practice contemplated or intended that result.

I had given some consideration to the terms of

(Testimony of George B. Burnham.)

the Federal Trade Commission Act; and I have read the discussion of 'Price Cutting as a Form of Unfair Competition', in Henderson's book, 'The Federal Trade Commission,' written in 1924, including the four cases discussed at pages 246 to 261. I presume there have been subsequent decisions upon the question. I have not had time to examine subsequent decisions. From my limited consideration of the question, I am inclined to the opinion that proof of a persistent maintenance of prices at such a low level as to preclude profit, for a period of approximately two years, with proof that the direct effect thereof is to crush attempted competition, would constitute 'unfair [203] methods of competition in commerce,' within the meaning of the law. Stating it more precisely: I think that proof of those facts would constitute a prima facie case and would throw upon the parties employing those methods the burden of justifying them.

If I should be employed in this matter, I would endeavor to have my clients employ your firm to be associated with me, providing they can and will pay a sufficient compensation.

While I cannot at this time guarantee employment, I am taking the liberty of submitting the above question to you. I would appreciate your off-hand impression; of course, I would also appreciate the off-hand impressions of your associates, but I do not want to impose upon the time of any of you, until I can give you some assurance of employment. I feel under such heavy obligations to all of you for

(Testimony of George B. Burnham.)

the many courtesies which you extended to me while I was in Washington, that I would not burden you with the present inquiry, except for the fact that I really hope that it may lead to a joint employment.

I purposely refrained from discussing the question above, so as to avoid extending the length of this letter; but there is one point which I would like to mention, viz.; If these two English concerns are engaged in actual competition, then the present price war is even more clearly a [204] case of 'unfair methods of competition in commerce'; while, on the other hand, if they are not engaged in actual bona fide competition, then the present ostensible price war could have no other purpose than to prevent the establishment of any competitors in the business.

There are a number of personal matters concerning which I want to write to you, but I will not stop to do so today. I am limiting this letter to the single inquiry stated above, because I expect to receive a call from the interested parties in about ten days from now, or possibly a little less. Therefore, I will send this letter by air mail, in the hopes that I may have a reply from you before anything arises here concerning the matter.

Very sincerely yours,

BTD:NL"

Q. Now, you understood, did you not, Mr. Burnham, that the two concerns referred to in this letter,

(Testimony of George B. Burnham.)

one as "two concerns," and one as "two English concerns," were the defendants in this action, American Potash & Chemical Company and Pacific Coast Borax Company? A. Yes.

Mr. Carr: That was a letter signed by Mr. Townsend?

Q. (By Mr. Harrison): That was a letter signed by Mr. Townsend and which he gave you a copy of? A. That's right. [205]

Mr. Harrison: I will stop at this point, your Honor.

The Court: Yes, we will take the afternoon recess at this time. Ladies and gentlemen of the Jury, please bear in mind the admonition that the Court has heretofore given to you.

(Recess.)

Mr. Harrison: Shall I proceed, your Honor?

The Court: Yes.

Q. (By Mr. Harrison): Mr. Burnham, later in the year 1928, and to be more specific, in November, 1928, did you receive an opinion letter from Mr. Townsend on this subject dated November 13?

A. Yes.

Q. Have you that letter?

A. Yes, it is here.

Mr. Carr: What was that date?

Mr. Harrison: November 13, 1928.

Q. Would you hand me that, please?

A. Yes.

Q. This is an original letter received by you within a day or two after its date? A. Yes.

(Testimony of George B. Burnham.)

Mr. Harrison: We offer the letter in evidence, if the Court please, as Defendants' exhibit next in order.

(The letter in question was thereupon received in evidence [206] and marked Defendants' Exhibit K.)

Mr. Harrison: That letter is written, I notice on the letterhead of Francis J. Heney? A. Yes.

Q. You had consulted Mr. Heney and Mr. B. D. Townsend on this matter? A. That's right.

Q. They had offices together, did they? They were associated, were they?

A. They were associated together.

Q. The letter is addressed to you at the Merchants Exchange Building in San Francisco; you had an office there at that time?

A. That's correct.

Q. I will read the letter to the Jury:

“Francis J. Heney, Attorney and Counsellor at Law, Suite 1002 Flatiron Building, San Francisco, Kearny 4860.

November 13, 1928.

“Mr. G. B. Burnham,
Insurance Exchange Bldg.,
San Francisco, California.

My dear Mr. Burnham: [207]

“Herewith I hand you the memorandum concerning the Federal Trade Commission, its

(Testimony of George B. Burnham.)

powers and methods of procedure, which I have prepared pursuant to my employment by you for that purpose. I have made this memorandum quite complete, as to the general features of the subject, and in doing so have gone beyond the limits of the question which you have in mind. I have done this for two purposes: (1) During our preliminary conferences upon the subject, I observed that some of your associates desired general information of this kind; (2) A fairly complete knowledge of the subject will enable anyone to have a more accurate appreciation of the rules concerning any particular subject or question.

Moreover, I have purposely prepared this memorandum in such form that it does not disclose any particular question which you or anyone else may have in mind.

Herewith I also hand you a memorandum concerning the 'Application of Federal Trade Commission Law to Borax Trade Conditions.' In this document, I have merely given my ultimate conclusions together with a few observations for the purpose of impressing upon the minds of yourself and your associates the importance of avoiding any general discussion of this subject, if any action is to be taken concerning it. I mentioned the reasons for this course during our last conference and all of you agreed with me. [208] Upon further consideration, I am even more strongly im-

(Testimony of George B. Burnham.)

pressed with the importance of observing this caution.

The conclusion which I have expressed in the latter memorandum is supported by a very intensive study which I have given the subject during the past two weeks. I am now convinced that proceedings before the Federal Trade Commission would result in substantial benefits to those interested in the subject. But I make this prediction with one condition annexed, and that is, the observance of the caution as I have recommended both in the memorandum and in this letter.

Herewith I also hand you bill for services rendered. I have performed all the services contemplated by this preliminary employment. In fact, I have gone much beyond the work which I contemplated at the time of this employment; but I did this, to enable me to examine every federal decision upon this subject, which would give me confidence in the views which I have expressed.

Very truly yours,

B. D. TOWNSEND

BDT:NL

Inc.3."

Q. Have you a copy of that letter referred to, Mr. Burnham? A. Yes.

Q. Have you the memorandum? [209]

A. Yes.

(Papers handed by witness to Mr. Harrison.)

(Testimony of George B. Burnham.)

Mr. Harrison: Mr. Burnham has handed me two memoranda, one marked Defendants' Exhibit 71 for Identification in the deposition which I now offer in evidence as Defendants' Exhibit next in order.

(The memorandum in question was thereupon received in evidence and marked Defendants' Exhibit L.)

Mr. Carr: Are you going to put two of them in together?

Mr. Harrison: Yes, I will put them in together, Mr. Carr, if you wish. There is a long discussion of the law in one memorandum. This is entitled, "Application of Federal Trade Commission Law to Borax Trade Conditions":

"For about three years, and particularly during the past year, a persistent price-war has been waged in the Borax Trade, until the price has been reduced to a point below actual cost of production, if all of the actual elements of production-cost are included in the computation, and the methods of computation are otherwise correct.

This situation imperils the continued existence of competition in the Borax Trade, and will ultimately lead to the establishment of an absolute trust, if the causes of the situation are not terminated.

Various excuses and explanations are offered by those responsible for this situation, but it is

(Testimony of George B. Burnham.)

quite evident [210] that these excuses and explanations are mere cloaks and disguises, and that an adequate investigation of the subject will develop proof that this situation is the natural and inevitable result, and therefore the very object and purpose, of trade practices which are in violation of the Federal Trade Commission Act, also the Federal Anti-Trust Laws.

These unlawful practices may be concealed by clever theories and ingenious accounting devices, but when the true facts are disclosed, the very cleverness and ingenuity employed to cloak and disguise the true facts, will become added and persuasive proof of consciousness of an illegal purpose.

If this matter is to be brought to the attention of the Federal Trade Commission, there should be little or no discussion of the facts or the methods by which they may be established, until they are presented to the Commission; otherwise there is danger, no matter how cautiously the subject is handled, that the party charged may learn the methods to be employed to expose the true facts, and may then defeat the most thorough and intelligent investigation by the Federal Trade Commission investigators.

This caution is especially applicable to cases where the illegal practices have been cleverly concealed or disguised. [211]

The proper course to pursue is to present

(Testimony of George B. Burnham.)

the matter clearly, and so as to arouse the interest which it deserves; the foregoing to be supplemented by such suggestions and services from time to time as may be desired.

In the event that the investigation results in the filing of charges by the Commission, any interested party, whose interest will be affected by the result of the hearing, will be permitted to intervene."

Q. Now, I call your attention to the fact, Mr. Burnham, that in the defendants' Exhibit K, which is Mr. Townsend's letter, he says that he has included a few observations "for the purpose of impressing upon the minds of yourself and your associates the importance of avoiding any general discussion of the subject."

Then: "I mentioned the reasons for this course during the last conference and all of you agreed with me. Upon the further consideration I am even more strongly impressed with the importance of observing this caution."

Had Mr. Townsend in fact expressed that caution to before he wrote this letter of November 13, from which I have quoted? A. I do not remember.

Q. Have you, Mr. Burnham, a copy of your circular letter to your stockholders of January 12, 1929? A. January 12, 1929?

Q. Yes. It is possible there may be a copy here in the deposition papers. I will show you this document and ask you whether or not that is a letter that

(Testimony of George B. Burnham.)

was sent out under your facsimile signature on January 12, 1929, to all stockholders of the Burnham Chemical Company. A. Yes, it is.

Mr. Harrison: We will offer the letter in evidence, if the Court please, as Defendants' Exhibit next in order.

(The document in question was thereupon received in evidence and marked Defendant's Exhibit M.)

Q. (By Mr. Harrison): Have you a copy?

A. Yes, I have a copy. I don't have one with me.

Mr. Harrison: I will read from my copy, Mr. Burnham, to save time. You can follow.

I just want to read two passages in this circular, ladies and gentlemen of the jury, a copy of which I have here, and of which Mr. Burnham has a copy:

"Some very important developments in the borax market have been taking place in recent months which have vital significance, in spite of the fact that the apparent motives back of them are being carefully camouflaged. For the past hundred years, in fact during its entire history, [213] the price of borax has never been below \$75 per ton delivered. It is rather a peculiar coincidence that last summer, just at the time we were getting ready to produce and put our product on the market, the price dropped to \$50 per ton delivered. Taking into consideration the fact that the freight charge is fixed, this means cutting the price of borax at the

(Testimony of George B. Burnham.)

plant almost in half. It means that we cannot make any profit on our borax at this early stage of development. We will be doing well to break even on our operating expense.”

Again later in the letter——

“It has been urged by some who are familiar with the situation that in selling borax at \$50 per ton our competitor is selling below actual cost of production, if correctly computed; and that this remarkable cut in the price of borax is nothing but a price war to destroy competition, and particularly the competition of young competitors who are struggling to become established. This matter has been under consideration for some time, and, for obvious reasons, the subject was kept confidential while it was under investigation. That is the reason why this price war has not been mentioned to you until the present time; and, for the same general reason, further discussion of it will not be indulged in at this [214] time, except to say that if our competitor has been selling borax for less than cost, it is believed that this fact will increase the wrongs imposed upon us, and therefore will increase the legal remedies available to us.”

Q. I call your attention, Mr. Burnham, to the statement there that “it has been urged by some who are familiar with the situation that in selling borax at this price our competitor is selling below actual cost of production.” Who was it who was familiar with the situation who urged that upon you?

(Testimony of George B. Burnham.)

A. I do not recall at this time. It may have been some of our customers.

Q. Some of your customers?

A. It might have been. I don't remember.

Q. They were not complaining of the price, I assume?

A. They didn't want to see us go out of business.

Q. Have you the circular letter of March 25, 1929, to the stockholders? I have it here, Mr. Burnham, from the deposition. This paper that I show you now is a circular letter, is it not, which was sent out on its date, March 25, 1929, under the facsimile signature of yourself as president, Mr. de Witt as vice president, and Mr. Whitney as secretary-treasurer? A. Yes.

Q. And was sent to all the stockholders of the company about its date?

A. That is right. [215]

Mr. Harrison: We offer the document in evidence, if the Court please.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit N.)

Mr. Harrison: You can follow me while I read from a couple of these pages to see that I get it right. I desire to read to the jury two paragraphs from this letter of March 25, 1929:

“Dear Stockholder:

“But just as we went into production came the slash in the price of borax. The price

(Testimony of George B. Burnham.)

dropped to the lowest level in the history of borax production. A drop of more than 50 per cent in the price of borax at the plant. The market became demoralized, and today there is almost no such thing as a definite borax price. There are as many prices as there are purchasers. We believe no one is really making a profit, and for this reason we expect conditions soon to change to normal, but the fight is still on. Your company, an infant in the industry, without definitely established markets, without surplus or reserve, was hit the hardest. The solid ground was taken out from under our feet. Our funds were soon exhausted and tied up in finished product."

Upon the next page:

"Let us take stock of our resources. What have we? [216] On close checking we believe that we have quite a lot. True enough, not much to put on the market for a quick sale, under the conditions, but a big thing if properly developed. Of course, the raw material is there—no one doubts that. Our processes are sound and economical—that has been proven to the dissatisfaction and disappointment of our adversaries. Our borax plant is complete and in splendid condition. Our organization is capable, progressive, loyal and energetic. Our processes, which we believe to be the most valuable at Searles Lake, are legally protected by

(Testimony of George B. Burnham.)

United States Letters of Patents. Our development work for the recovery of salts other than borax is progressing rapidly and satisfactorily. What is wrong, then? Nothing fundamentally, except that some sinister forces apparently are trying to rob us of what is rightfully ours. They know our weak point (lack of surplus and reserve) and they are trying to take advantage of it."

Q. In writing and signing that letter, whom were you intending to designate by the words "some sinister forces?"

A. I don't know. That is why I said I did not specify.

Q. Did you have anybody in mind when you wrote that letter? A. I don't know.

Q. You have no idea now?

A. That is why I couldn't name them at that time.

Q. What is that? [217]

A. I was not able to name them at that time.

Q. They certainly included the defendants in this case, the American Potash & Chemical Corporation and Pacific Coast Borax Company, did they not?

A. We knew they were infringing our patents, that is, we believed they were infringing our patents, using our process to defeat us.

Q. Didn't you intend to designate them, didn't you have them in mind when you spoke of sinister forces in that letter?

(Testimony of George B. Burnham.)

A. We had one of them in mind, and that was the American Potash & Chemical Corporation, because we felt pretty certain that they were infringing our processes and using our processes to defeat us, our patented processes.

Q. I will ask you whether in your deposition on page 291, line 5, you gave this testimony:

“Q. Now, Mr. Burnham, who were the sinister forces that you there referred to who were trying to rob you of what was rightfully yours?

A. There might have been sinister forces that I had in mind.

Q. But you had in mind among them the Pacific Coast Borax Company and the American Potash & Chemical Corporation?

A. I was wondering if they might not be one of the companies.

Q. When you use the term ‘sinister forces’ in this letter, [218] those two companies were either the sinister forces or among them?

A. They were among them. We had others in mind, such as the Blue Sky Commissioners.”

Q. Did you so testify? A. Yes.

Q. Now, I would like to call your attention to the month of December, 1928, and particularly a conversation that you had with Mr. Emlaw on December 6, 1928. Will you turn to your diary for that date? A. Yes, I have it.

Q. Do you have that entry?

(Testimony of George B. Burnham.)

A. I have one entry here dated December 6, 1928.

Q. Refreshing your recollection by that entry, is it a fact that on that day you called upon Mr. Emlaw? A. Yes.

Q. In New York? A. That is right.

Q. And on that occasion you accused him, did you not, or accused his company, the American Potash & Chemical Corporation, of infringing the patents of the Burnham Chemical Company?

A. That is right.

Q. And he denied the accusation, did he not?

A. Yes.

Q. And he was angry and defiant in denying the accusation, [219] was he not?

A. In words somewhat along that line, yes.

Q. Isn't that a fair description?

A. Yes, that would be.

Q. You had a draft of a telegram describing his denial as being angry and defiant? A. Yes.

Q. Notwithstanding his denial of patent infringement you did not believe that denial, did you?

A. No, I was pretty certain that they were infringing our processes. I did not have absolute proof, but I felt fairly convinced of it.

Q. You felt fairly certain that they were infringing, didn't you, at that time? A. Yes.

Q. Now, then, after having left that conversation, when Mr. Enlaw was angry and defiant, and when you did not believe him, did you go over to

(Testimony of George B. Burnham.)

see Mr. Zabriskie on the same day on this patent matter? A. Yes.

Q. That was on December 6, 1928? A. Yes.

Q. And you had a talk with him about the matter of the infringement of your patent by the American Potash & Chemical Corporation, did you not?

A. Yes.

Q. What did you tell him in effect? [220]

A. Well, I had an hour's or more talk with him, and I told him that I believed the American Potash & Chemical Corporation were infringing our patents, and we discussed the particular patents that I had in mind, and I asked Mr. Zabriskie if he would be willing to finance a suit against the American Potash & Chemical Corporation for the infringing of our patents.

Q. What did he say to that?

A. He said that was very interesting and he would like to give it more thought, and asked me to come back the next day and discuss it with Mr. Tingley, the chief chemist, and go over the patents again with him to see again for sure if the American Potash & Chemical Company were infringing our patents.

Q. Did you tell him how you would be benefited or how the Pacific Coast Borax Company would be benefited if he put up this money to bring the suit against the other company?

A. Yes, I told him I would give them exclusive rights to use our patented processes, and furthermore it would strengthen the price of borax, be-

(Testimony of George B. Burnham.)

cause if the American Potash & Chemical Company were infringing our process, and we prevailed in a suit against them, then they would have to pay us royalties, and, of course, that would increase the price of borax.

Q. And so that would benefit the Pacific Coast Borax by raising the price? [221]

A. Yes, that would be a legal way of protecting ourselves on the drastic cut in price.

Q. Mr. Zabriskie asked you to write him a letter?

A. Well, not that day.

Q. Did he the next day?

A. The next day, yes.

Q. What did he say?

A. We went into the thing more thoroughly the next day and he said to write me a letter conforming what we talked about and to give him a definite understanding of what kind of a proposition we would make to them.

Q. Now, you did write him a letter, then, did you?

A. I returned to San Francisco, conferred with our directors, and wrote Mr. Zabriskie a letter on January 15th, 1929.

Q. You have that, do you, Mr. Burnham? It doesn't seem to be here.

A. Yes, this is the only copy of the letter that I have, and if it is turned into the court, I would like to have copies made.

Q. I have no objection to your having a copy

(Testimony of George B. Burnham.)

made and having it substituted later, if Mr. Carr wishes and you do, too.

A. The same applies to some of the documents Mr. Townsend gave us.

Q. We can arrange that.

We offer this letter in evidence, if the Court please, [222] as Defendants' Exhibit next in order.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit O.)

Mr. Carr: What is the date?

Mr. Harrison: January 15, 1929, written by Burnham Chemical Company, G. B. Burnham, to the Pacific Coast Borax Company, Attention Mr. C. B. Zebriskie. This is a somewhat long letter, and if Mr. Carr wishes to read it all later, I have no objection, but I wish to call to the jury's and the witness' attention the following passages:

"Pacific Coast Borax Company, 100 William Street, New York City, N. Y.

Dear Sirs:

"Pursuant to our conversation last month concerning our patent situation at Searles Lake, I have discussed the matter with our directors, and submit to you the following statement of our position concerning the matter:

"1. For a long time we received information to the effect that our patent rights, as to borax,

(Testimony of George B. Burnham.)

were being violated by the operations of the American Potash & Chemical Corporation. After a careful investigation and consideration of the matter, we became convinced that the American Potash & Chemical Corporation was, **and for a long time** had been, engaged in flagrant violations of such [223] patent rights; whereupon we served upon them a formal notice of infringement on October 31, 1927."

Mr. Carr: Will you read a little louder?

Mr. Harrison: Yes, surely.

"2. In the meantime, the American Potash & Chemical Corporation has engaged in a persistent and flagrant price war, as to borax, reducing the price to \$50 per ton or less, delivered anywhere in the United States. We are reliably informed that the prices quoted by this company in the present month and for several months last past, are below its actual cost of producing borax, if such production cost be accurately and properly computed, and we are further reliably informed that the specific purpose of this price war is to destroy competition as to borax.

"3. The American Potash & Chemical Corporation could not carry on this price war except for the fact that they are illegally employing the economical advantages of the patent rights of the Burnham Chemical Company. In other words, they are illegally using the pat-

(Testimony of George B. Burnham.)

ent rights of the Burnham Chemical Company for the specific purpose of manufacturing borax at a low cost, and then selling the borax at such a low price as to drive out competitors, including the Burnham Chemical Company, which is the owner of the patent rights illegally employed [224] for that purpose. We are advised by our attorneys that, under these facts, the American Potash & Chemical Corporation is engaged in an 'unfair method of competition,' within the provisions of the Federal Trade Commission Act, and allied acts."

Q. You understand, Mr. Burnham, those allied acts included the Antitrust Laws, did you not?

A. I didn't know. [224-a]

Q. What did you mean by the term "Allied acts?"

A. All Anti-Trust acts I presume are included.

Q. I should like to read one other paragraph on that letter, on the last page:

"I will venture the prediction that the very institution of a suit by us as above proposed will result in an immediate increase of the price of borax of not less than \$10 per ton, and this increase alone will much more than offset the cost to your company of such benefits of the above proposition."

Did you tell Mr. Zabriskie, Mr. Burnham, how much you wanted him to put up for the expense of this suit?

(Testimony of George B. Burnham.)

A. I believe I suggested \$50,000.

Q. What reply did he make to that letter?

A. I couldn't find a reply in my file, but it seems to me he referred the matter to London and I never did hear the result.

Q. Well, didn't he in fact refuse to assist you in the matter of that particular suit?

A. Yes, I couldn't find his reply, but it seems to me we got a letter, but I couldn't find it in the file.

Q. In any event, in one form or another you learned the Pacific Coast Borax Company was not willing to put up this \$50,000 or any part of it?

A. Yes. [225]

Q. And when you learned that, that revived and increased your belief, did it not, that the P.C.B., the Pacific Coast Borax, had acted jointly with the American Potash & Chemical Company for the purpose of injuring the Burnham Chemical Company?

A. No, I don't think it did that.

Q. You don't think it had any effect in that regard. Didn't it give you an added belief and suspicion when Zabriskie wouldn't cooperate with you, that he was cooperating with the American Potash & Chemical Company in the matter of cutting prices?

A. Well, Zabriskie—they had their own patents and they began to think that the American Potash & Chemical Company were infringing on the patent of the Pacific Coast Borax Company and perhaps they would be just as well off to sue the Ameri-

(Testimony of George B. Burnham.)

can Potash & Chemical Corporation for infringing on their own patents.

Q. I don't think, perhaps, you understood my question:

Did the fact that Zabriskie wouldn't help you, give you an added belief or suspicion that his company was cooperating with the American Potash & Chemical Company to cut prices to drive you out of business? A. No, it didn't.

Q. I will ask you to turn to the deposition, at page 105, if you will, please—Page 105, Line 11, and I will ask you if you testified as follows: [226]

Mr. Carr: Page 105, Line 11?

Q. (By Mr. Harrison): Yes, have you that?

A. 105, Line 11?

Q. Yes. I will ask you whether you testified at your deposition that was taken within the last month as follows:

“Q. Then when Mr. Zabriskie refused to advance the money to assist you in bringing a patent suit against the American Potash & Chemical Corporation so that you could get the price up, you attached significance to that, did you?”

Mr. Carr: What page and what line?

Mr. Harrison: Line 11.

Mr. Carr: Oh, pardon me.

Mr. Harrison: I will re-read the question:

“Q. Then, when Mr. Zabriskie refused to advance the money to assist you in bringing a

(Testimony of George B. Burnham.)

patent suit against the American Potash & Chemical Corporation so that you could get the price up, you attached significance to that, did you?

A. Well, I felt very certain that the American Potash was infringing our patents and the very fact that Zabriskie, who wouldn't cooperate in any way to help us, and incidentally help himself for supporting our infringement suit against the American Potash & Chemical Company, the very fact that he wouldn't cooperate gave me added belief or suspicion that he was cooperating with the American Potash [227] & Chemical Company and cooperating with them to cut the price in order to drive us out of business.

Q. Did you so testify?

A. I did, but I have been thinking about that since I testified to that and I have been wondering a little bit.

Mr. Harrison: May I ask the Court to instruct the witness to answer the question?

The Court: Yes, your attorney can bring that out. It takes too long when you give these long explanations.

The Witness: Yes, that is the way I testified. It is a long time since this occurred.

Q. (By Mr. Harrison): What—the deposition?
A. No, this occurrence.

Q. Yes, since 1928?
A. Yes.

(Testimony of George B. Burnham.)

Q. But the deposition was quite recent, was it not? A. Yes.

Q. And after giving the deposition, you read it over, did you not, for the purpose of making any corrections you desired in your testimony?

A. This more thorough study of this particular situation occurred just recently.

Q. Now, we may pass, I think, Mr. Burnham, to the conversations which you say you had with Mr. Zabriskie—oh, my associate reminds me that the deposition was signed a week ago today. [228] That is correct, isn't it? A. About that.

Q. Now, about these conversations that you testified to with Mr. Zabriskie and Mr. Emlaw on May 17, 1929; when you went to Mr. Zabriskie you accused him, did you not, of cooperating with the American Potash & Chemical Company in the matter of the price cuts in order to injure you and your company? A. On what date?

Q. May 17? A. Yes.

Q. And then after your conversation with him you immediately went over to Mr. Emlaw and accused him, did you not? A. Yes.

Q. You never saw Mr. Zabriskie after that time?

A. No.

Q. You had never before discussed the price cuts with him except in your conversations in December about patent infringement?

A. No, not in that regard.

Q. Well, I would like you to think: Did you ever discuss the price cuts with Mr. Zabriskie before that

(Testimony of George B. Burnham.)

occasion, except your endeavor to get him to put up money in the previous December?

A. No, I don't think I did.

Q. Now, then, you have some diary entries about those conversations, have you not? [229]

A. Yes.

Q. I would like you to produce them, please.

A. The ones on May——?

Q. The ones on May 17? A. Yes.

Q. While you are looking for that, Mr. Burnham, Mr. Zabriskie died within a year or two after this conversation, did he not, early in the 30's?

A. In the 30's some time.

Q. Early in the 30's, didn't he?

A. I believe so. Here is the diary entry.

Q. Yes, before we get to that, let me first ask you this question: You knew at that time that the head of the Borax Consolidated and the Pacific Coast Borax was Mr. R. C. Baker of London, did you not?

A. I knew—? Will you state the question again?

Q. You knew in 1929 when you talked to Zabriskie that the head of the company was Mr. R. C. Baker of London, did you not?

A. I don't remember.

Q. You have heard of Mr. Baker, haven't you?

A. Yes.

Q. And you knew he was the head of the company, didn't you?

A. I could say yes, but I am not quite certain. I think I did see it in the Moody's Manual, or

(Testimony of George B. Burnham.)

Moody's Publication, [230] that he was head of the company.

Q. That was a matter of general trade knowledge, wasn't it?

A. Yes, I believe it was; I wouldn't swear absolutely.

Q. I understand. We will look at those diary entries now, if you please. This has been marked, I think, but in any case on which side of the page is the entry about these conversations?

A. Right here (indicating).

Q. Beginning in the middle of the right hand page?

A. Yes—down here also (indicating).

Q. There are some erasures there in the date, are there not? Is that "May" written over an erasure?

A. Yes, that is written over an erasure, but the erasure occurred at that time.

Q. Well, what is the word that was there before the erasure was made—can you tell?

A. "Talked, t-a-l-k-e-d." The next word is hard to make out. Then I have written over that, "May 17, 1929."

Q. Now, where is the memorandum of the Emlaw conversation? Did that follow the Zabriskie?

A. Yes, and also on the opposite page of Zabriskie—both. The Emlaw conversation starts on May 17, 1929, at the top of the next page.

Q. Is there an erasure of the word "May" in the account of the Emlaw conversation? [231]

A. No, there is not, that I can detect.

(Testimony of George B. Burnham.)

Q. Now, with respect to the Emlaw conversation, I wish you would read to the jury just what your diary states.

A. "Called on Emlaw of the American Potash & Chemical Corporation regarding the selling of concentrated brine. Says brine must have enough $2 \text{ Na}_2 \text{ CO}_3$ to make $3 \text{ Na}_2 \text{ SO}_4$, $2 \text{ Na}_2 \text{ CO}_3$. Refer matter to Burke. Did not discuss patents."

Q. That is all that appears on that page, is it not?

A. Yes, that's right.

Q. And the fact is you did not discuss the patent matter with him as to which you had had that controversy with him in the previous December?

A. That's right.

Q. But you still disbelieved what he had told you the previous December, to-wit, that they were not infringing your patent?

A. Yes.

Q. Now, then, there is nothing on that page relating to price cuts or any accusation or any denial, is there?

A. No.

Q. What other entry do you consider now has any relation to the Emlaw conversation?

A. On the other page it says:

"American Potash & Chemical Corporation
Fitzroy 9620, Whitehall 7240."

Q. Let me interrupt you there: You say, "on the other page." [232] In order that the jury may understand and that the record may be clear,

(Testimony of George B. Burnham.)

will you state what you mean by that? In other words, that isn't on the same page as the note you have given us here; that is two pages earlier and on a page preceding the notes of the Zabriskie conversation? A. Yes.

Q. All right, now, go ahead and tell us what you have written on that earlier page.

A. "Whitehall 7240. 233 Broadway. P.C.B., Beekman 0332."

Q. Those were evidently all telephone numbers and addresses, were they not?

A. Yes. "Emlaw says——"

Q. Is "Emlaw says" immediately below those telephone numbers?

A. With an arrow going from the "American Potash & Chemical Corporation" down to here, to "Emlaw says."

Q. That is written at the bottom of the page?

A. Yes.

Q. Now, will you read the bottom of the page exactly?

A. "Emlaw says not selling. Nothing in it. Would sell if could get offer."

Q. You have read us, have you not, everything in your book that up to the present time relates in your opinion to the Emlaw conversation?

A. That is all I had written at the bottom on the conversation.

Mr. Harrison: Yes. In order that the testimony of the [233] witness may be clear, may we ask this exhibit be shown to the jury for a moment?

(Testimony of George B. Burnham.)

The Court: Yes. Mr. Jones, will you take the book from the witness and pass it to the jury.

The Witness: And there are——

The Court: No, just give the book to the bailiff.

(Thereupon the book referred to was exhibited to the jury.)

The Court: Has this book that has been shown to the jury been identified in any way in the record?

Mr. Harrison: I thought it had been, but we better do it if it has not already been done.

Mr. Carr: I think it has been done, yes.

The Court: Was the one we put the identifying sticker on the back of this book?

The Clerk: Yes.

The Court: Then, it is identified for the record as Plaintiff's Exhibit 1 for Identification.

Mr. Carr: Yes.

Mr. Harrison: Yes.

The Court: We will take an adjournment in this case, ladies and gentlemen of the jury, until next Tuesday morning at ten o'clock. The court has other matters to take up on Monday. I try to dispose of some of these matters we have to hear in the mornings before we go on with this case, but Monday is not even long enough to do that. That is why [234] you have to sit here and wait in the mornings while we hear other matters. However, we do try to dispose of some of those other matters on Mondays. That is why, ordinarily, we do not have juries come in on Mondays.

(Testimony of George B. Burnham.)

I will ask you, then, to return on Tuesday morning at ten o'clock. In the meantime, please bear in mind the admonition heretofore given you, not to talk about this case among yourselves, nor with anyone else on any subject connected with the case, nor are you to form or express any opinion as to what your decision should be until the case is finally submitted to you.

(The further hearing of the cause was continued until Tuesday, April 1, 1947, at 10:00 o'clock a.m.) [235]

Tuesday, April 1, 1947, 10:00 o'Clock A.M.

The Clerk: Burnham Chemical Company vs. Borax Consolidated.

Mr. Carr: Ready.

Mr. Harrison: Ready.

The Court: Mr. Burnham was on the witness stand.

GEORGE B. BURNHAM

recalled.

Cross-Examination

(Resumed)

Q. (By Mr. Harrison): Mr. Burnham, when court adjourned last week we were talking about your conversations with Mr. Zabriskie and Mr. Emlaw on May 17, 1929. It is a fact, is it not, that

(Testimony of George B. Burnham.)

prior to that time and in the spring of 1929 you had been East for sometime? A. Yes.

Q. Is it not a fact that while you were East, and before the conversations with Mr. Zabriskie and Mr. Emlaw, you called upon some of the stockholders of your company in New York?

A. Yes.

Q. Did you tell those stockholders in New York on that occasion that the price cuts by those defendants had occurred simultaneously and in the very month you started production?

A. Yes, I no doubt told them the historical facts about the company. [236]

Q. And you told them the price cuts had occurred simultaneously and in the very month when your company had started production?

A. I don't know as I used the word "simultaneously," but I used the word in that month, the very month we started production.

Q. You used words to that effect? A. Yes.

Q. Did you also tell them you thought it was a peculiar coincidence that the price cuts had occurred in the very month you started production?

A. Yes.

Q. And that was before your talk with Mr. Zabriskie on May 17, 1929? A. Yes.

Q. Now, after your talk with Mr. Zabriskie on May 17, 1929, did you call upon those stockholders and tell them that some mistake had been made?

A. No.

(Testimony of George B. Burnham.)

Q. Did you tell them of your talk with Mr. Zabriskie?

A. No, because I returned to California shortly afterward.

Q. You returned to California without communicating with those stockholders? A. Yes.

Q. When you called upon Mr. Zabriskie on the morning of May 17, 1929, you accused him, did you not, of conspiring with the [237] American Potash & Chemical Corporation for the deliberate purpose of driving you out of business? A. Yes.

Q. And when you accused Zabriskie of this conspiracy to drive you out of business did you tell the reasons why you were accusing him?

A. Well, I told Mr. Zabriskie, "It looks to me like you fellows were cutting the price of borax purposely, deliberately, to drive the Burnham Chemical Company out of business.

Q. And you called his attention to the fact that the price cut had occurred the very month you started production? A. Yes.

Q. You talked to Zabriskie that morning, and then you went right over to see Mr. Emlaw that afternoon, only taking time for lunch, did you not?

A. Yes.

Q. And when you called upon Mr. Emlaw in the afternoon you accused him of cutting prices in conspiracy with the Pacific Coast Borax for the purpose of injuring your company, did you not?

A. Yes, I wanted to check up on what he would say regarding the matter, and I told Mr. Emlaw

(Testimony of George B. Burnham.)

about the same as I told Mr. Zabriskie, namely, "It looks as though you had cut the price on borax for the deliberate purpose of driving us out of business." [238]

Q. You made that accusation as firmly as you could with politeness, did you not?

A. Yes, that is right.

Q. Did you tell Mr. Emlaw why it was that you believed he and Zabriskie's company were conspiring to drive you out of business?

A. Well, I was pretty much convinced after my long talk with Zabriskie——

Q. You were pretty much—I didn't get the word.

A. I was pretty much convinced after my long talk with Zabriskie——

Mr. Harrison: If your Honor please, I move to strike out that particular statement as not responsive to the question, as to what he told.

The Witness: What was the question again?

Mr. Harrison: Will you read it, Mr. Reporter?

(Question read.)

A. Yes, substantially the same as I told Mr. Zabriskie.

Q. That is to say, it seemed very strange that the price was cut in half the very month your company started production? A. Yes.

Q. And that they knew you were starting production in that month? A. Yes.

Q. Both Zabriskie and Emlaw denied the accusation, did they [239] not?

(Testimony of George B. Burnham.)

A. Yes, they did.

Q. What reply did Mr. Zabriskie make when you accused his company and the American Potash & Chemical Corporation of conspiring against you?

A. He replied that they were not deliberately driving us out of business; they were not trying to injure us, that the price cut was due to an over supply of borax on the market, that the American Potash & Chemical Corporation were making a tremendous amount of borax, and the warehouse was full, and yet they had to sell it to get rid of it. And also that they had made a big production in the Kramer deposits, and that their cost of production would be cheaper because they had a better source of borax.

Q. You have told us as far as you remember all that Zabriskie said on that subject, have you not?

A. On the subject of why the price was dropped.

Q. Yes. A. Yes.

Q. What reply did Mr. Emlaw make when you accused him of conspiring with the Pacific Coast Borax?

A. He also said that there was an over supply of borax, and that his warehouse was full, and that they could not sell it, but they would sell it if they could—if they could just get an offer for it. [240]

Q. I want to get this clearly: the substance of what Mr. Zabriskie gave you as the reason for the cutting of the price was the large production, the over production, and the cheaper source of borax in the Kramer District? A. That is right.

(Testimony of George B. Burnham.)

Q. And the substance of the reply that Mr. Emlaw made was that they had an immense production, and that their production had gone up by leaps and bounds? A. Yes.

Q. Now then, neither Mr. Emlaw nor Mr. Zabriskie gave you any actual production figures did they? A. No.

Q. They spoke only in generalities?

A. That is right.

Q. Yes.

A. Well, I might say this: Zabriskie said if we could produce—if the production was 300,000 tons of borax per year, that is, if they could make the demand equal to 300,000 tons, they would make more money in the end.

Q. But what I am asking, Mr. Burnham, is whether they gave you any actual figures or statistics as to production at that time?

A. No, no actual statistics.

Q. They spoke only in generalities?

A. Yes. [241]

Q. As a matter of fact, you knew before you ever had those talks with Emlaw and Zabriskie that the production was large, did you not?

A. Yes.

Q. And you had already obtained on your trip east precise information about the amount of production, had you not?

A. Well, I had gathered some information on that subject.

Q. Some information with figures, had you not?

(Testimony of George B. Burnham.)

A. That the production was very much greater in the year of 1928 than it was in 1927.

Q. So when you went to see those gentlemen on May 17 you knew there was overproduction and a large amount overhanging the market, did you not?

A. Yes, but I could not understand why there should be such a cut in the price of borax the very month we started production.

Q. You also knew that the Kramer deposit, which belonged to the Pacific Coast Borax, was practically clear of borax, requiring very little expense to mine or remine, did you not?

A. Yes.

Q. So that you knew when you went to see Mr. Zabriskie that morning that the Kramer deposit was a cheaper source than had theretofore existed, did you not?

A. Yes, I know in a general way that it ought to be a cheaper source of borax, except that if a large production is made at [242] Searles Lake and borax is treated as a byproduct, it could be a cheaper source—as cheap a source of borax.

Q. But as far as the then methods are concerned, you knew that Mr. Zabriskie's company had found a cheaper source of borax than they ever had before?

A. Yes.

Q. And that is what Mr. Zabriskie told you that morning, was it not?

A. Yes.

Q. You knew also that the American Potash & Chemical Company process by which both borax and potash were taken was of such a kind that if

(Testimony of George B. Burnham.)

they produced potash they would necessarily produce borax? A. Yes.

Q. And the only thing they told you that morning that you did not already know was their denial that they had deliberately done this price cutting for the purpose of driving you out of business, isn't that true?

A. Well, except for this: I could not understand why it should go so low, even though there was an over supply. I could not understand why it should go down so low as \$13 a ton in bulk.

Q. So you still felt, after you had left them, after they had told you these facts you already knew, and after they denied the charge that they were conspiring, you still thought it [243] was strange that it should have gone so low, did you not?

A. No, after my talk with Mr. Zabriskie, I was very much—I was completely convinced that it was absolutely genuine competition.

Q. I want to call your attention, Mr. Burnham, to this letter which has been introduced in evidence as Defendants' Exhibit K, which was the letter to you from Mr. Townsend dated November 13, 1928; you remember that? A. Yes.

Q. And particularly to the paper that was attached to that, which has been marked Defendants' Exhibit L, entitled "Application of Federal Trade Commission Law to Borax Trade Conditions." Have you that before you?

A. No, I haven't it before me.

(Testimony of George B. Burnham.)

Q. I want to call your attention to these provisions in that letter, these statements:

“For about three years, and particularly during the past year, a persistent price war has been waged in the borax trade, until the price has been reduced to a point below actual cost of production, if all of the actual elements of production-cost are included in the computation, and the methods of computation are otherwise correct.

“This situation imperils the continued existence of competition in the borax trade and will ultimately lead to the establishment of an absolute trust, if the causes of [244] the situation are not terminated.”

And then follows this sentence: “Various excuses and explanations are offered by those responsible for the situation, but it is quite evident that these excuses and explanations are mere cloaks and disguises, and that an adequate investigation of the subject will develop proof that this situation is the natural and inevitable result, and therefore the very object and purpose, of trade practices which are in violation of the Federal Trade Commission Act, also the Federal Antitrust Laws.”

When you received that letter in November, 1928, six months before the Zabriskie conversation, what did you understand was the meaning of the term “various excuses and explanations,” which were

(Testimony of George B. Burnham.)

“mere cloaks and disguises” according to Mr. Townsend?

A. That question was discussed, and it was discussed very lengthily between our directors, and also the officers of the West End Chemical Company, in the latter part of November——

The Court: No, all he wanted to know was what did you understand to be the meaning of those terms?

Mr. Harrison: When you received that letter.

A. The distribution of cost of production of borax over potash was a matter of bookkeeping, and the American Potash & Chemical Company were probably figuring that their cost of borax was almost nothing, because it was a by-product, that is, they could [245] make that statement. The question was whether it really is correct to figure that borax is a by-product or not.

Q. (By Mr. Harrison): Are you finished, Mr. Burnham? A. Yes.

Q. I would like you to think it over a while, and isn't it true that when that letter come to you in November, 1928, you understood that to refer to other excuses than the mere matter of accounting?

A. There was one other excuse, that is, whether or not the Kremer deposits could produce as cheap, so cheaply.

Q. One of the excuses which Mr. Townsend considered a mere cloak and disguise was the fact that the Kremer deposit was a cheaper source of supply?

A. That was a question then: that the Kremer

(Testimony of George B. Burnham.)

deposit had only fairly recently been opened up, I think it was 1927.

Q. Wasn't it 1926, about the end of 1926?

A. Well, it might have been the end of 1926 or the early part of 1927.

Q. And this was the end of 1928?

A. Yes, a year and a half later.

Q. And you understood that one of the excuses which Mr. Townsend referred to as being a mere cloak and disguised was the claim that the Kremer field was a cheaper source of supply for borax, did you not?

A. Well, I understood that was what Mr. Townsend contended. [246]

Q. And that was also one of the statements made to you by Mr. Zabriskie in May, 1929, as an excuse or explanation for the price cut, was it not?

A. Yes.

Q. Isn't it true when you got Mr. Townsend's letter in November, 1928, you understood that another explanation or excuse that was being given which he considered to be a mere cloak and disguise was the production of borax?

A. Mr. Townsend might have had that in mind.

Q. Didn't you so understand it at the time?

A. I don't remember that I did.

Q. May I refresh your recollection by your deposition, if you will turn to page 446 of the deposition, I will ask you if you testified as follows; 446 line 17:

A. 446, line 17?

(Testimony of George B. Burnham.)

Q. Yes. I will read to you and ask if you testified as follows.

“Q. What was the various excuses and explanations offered by those people or referred to?”

Counsel was examining you about this letter.

“A. Well, he was probably referring to the fact that there were improved processes for making borax and thereafter the price went down; also because the Kremer field was a cheaper source of borax supply, and that would cause the price to be reduced, and also because there was an over-supply of borax on the market. Those conditions [247] could naturally result in a price reduction, and those might have been the reasons that our competitors were giving as the reason for the price drop.

Q. And to the best of your recollection now, what you have just said were the various excuses and explanations offered for the price cut at that time? A. Yes.

Q. The various excuses and explanations which are here referred to? A. Yes.”

Did you so testify? A. Yes.

Q. Now, then, at the time the Zabriskie conversation occurred on May 17, 1929, there was actual litigation between your company and his company, the Pacific Coast Borax Company, one of the defendants here, before the Land Office, with respect

(Testimony of George B. Burnham.)

to your rights to obtain a lease in the Little Placer property, was there not? A. Yes.

Q. And that litigation had actually been set for a contested hearing before the Land Office when you had your conversation with Mr. Zabriskie in May, 1929? A. Yes.

Q. The Little Placer was a property down in the general Kramer District, was it not?

A. Yes. [248]

Q. Of the same general character as the property being operated in the Kremer District by the Pacific Coast Borax Company? A. That is right.

Q. And your company and the Pacific Coast Borax Company were in litigation at that time as to who was entitled to the Little Placer?

A. Yes.

Q. During that conversation on May 17, 1929, there was some reference to the subject of patent infringement, was there not, in the talk with Mr. Zabriskie? A. What was that question again?

Q. There was some reference to your claim that the American Potash & Chemical Company had infringed your patents, the claim as to which you had asked Mr. Zabriskie's help in the previous December, and as to which you were suspicious because he had not helped you?

A. This is at our meeting in 1917.

Q. I am asking you whether in your conversation in May, 1929, that claim for patent infringement was referred to. A. Yes, it was referred to.

(Testimony of George B. Burnham.)

Q. And you at that time repeated your statement that you believed that the American Potash & Chemical Corporation were infringing your patent? A. Yes.

Q. But when you talked to Mr. Emlaw the same day you did not [249] say anything about that claim for infringement?

A. No, I didn't want to rile up Mr. Emlaw again on that subject. I wanted to get his cooperation.

Q. You had had a rather heated interview with Mr. Emlaw the previous December, had you not?

A. That is right.

Q. In which he became quite angry?

A. Yes.

Q. And in which he denied that there was any patent infringement? A. Yes.

Q. And at that time you did not believe this denial, did you?

A. No, because I felt very strongly that they were infringing our process.

Q. Now, then, I would like to direct your attention to January, 1930, Mr. Burnham, that is about eight months after your conversation with Mr. Zabriskie and Mr. Emlaw; there was a hearing up at Carson City, was there not, on your application for temporary injunction in the suit which you had brought against the Postmaster to enjoin the enforcement of the Fraud Order? A. Yes.

Q. That was a three-day hearing, was it not?

A. I believe so.

(Testimony of George B. Burnham.)

Q. You were present in court at the time?

A. I was. [250]

Q. And Mr. Townsend presented the case as your lawyer in court before Judge Norcross, at Carson City, did he not?

A. Mr. Townsend and Mr. Lunsford.

Q. On that occasion and during that hearing did you sign and was there filed an affidavit of which I now show you a copy? (Handing a document to the witness.) Do you recall that affidavit?

A. Yes.

Q. You signed it and swore to it under oath, did you not? A. Yes.

Q. And that affidavit was used in support of your application for temporary injunction in those court proceedings, was it not?

A. That is right.

Q. And also the amended complaint, which has already been introduced in evidence, the amended complaint in that suit? A. Yes.

Mr. Harrison: We offer the affidavit in evidence if the Court please.

(The affidavit in question was thereupon received in evidence and marked Defendants' Exhibit P.)

Mr. Harrison: Ladies and gentlemen of the jury, I will read certain portions of this affidavit. If Mr. Carr wishes to read others he may. This is entitled in the case of Burnham Chemical Company against George Smith as Postmaster: [251]

(Testimony of George B. Burnham.)

“Affidavit in Support of Motion for
Temporary Injunction

State of Nevada,
County of Washoe—ss.

George B. Burnham being first duly sworn,
deposes and says:

1. The following portions of the amended complaint in the above-entitled action are true to affiant's own personal knowledge:

“All of paragraph I;

“All of paragraph II, excepting subdivision (b) thereof, which is a question of law, and which affiant believes to be true.

“All of paragraphs III, IV, V, and VI.

“All of paragraph VII, excepting subdivision (f) and (g), and the last sentence in subdivision (i), which are stated upon information and belief, and affiant believes them to be true.

“Subdivisions (c), (d), (e), (f), (g), except the allegations therein stated to be made upon information and belief, (h) and (j) of paragraph VIII.

“All of paragraph XII.

“All of paragraphs XXVIII and XXX.”

Q. That refers, does it not, Mr. Burnham, to the amended complaint which you had filed in this case and which has been introduced in evidence here? [252]

(Testimony of George B. Burnham.)

Q. And the one which you printed and sent to your stockholders? A. That is right.

Mr. Harrison: In order that that meaning may be clear, I should like to read to the jury certain passages from paragraphs XXVIII and XXX, which the affiant here states to have been made upon his personal knowledge. If you will take that and follow with me, I will use my copy, Mr. Burnham.

Mr. Harrison: I will hand that copy to the Clerk. Paragraph 28 referred to as being true of the witness' own knowledge is entitled: "Attitude of Stockholders Since Issuance of Fraud Order."

Subdivision (c) of that same paragraph which the affiant stated was true of his own knowledge reads as follows:

"Many of them——"

referring to the stockholders——

"have conveyed information to the effect, which plaintiffs believe to be true, and upon such information and belief allege the fact to be, that the issuance of the fraud order was procured and induced by dishonest and fraudulent intrigues and machinations on the part of the competitors of the Burnham Chemical Company, and particularly the 'Borax Trust.'"

And Paragraph 30, which he states is true of his own knowledge is entitled: "Additional Facts Concerning Efforts of Borax Trust to Preclude Development Solar Process; Concealment Thereof from Solicitor and Postmaster-General."

(Testimony of George B. Burnham.)

As part of the paragraph it is stated that:

“Plaintiff’s allege that by their unlawful violation of their contractual obligations, and their subsequent unlawful assertion of rights adverse to Mr. Burnham as hereinbefore stated, the Pacific Coast Borax Company and the Solvay Process Company intended, and attempted, to [253] render Mr. Burnham financially helpless and permanently preclude the development of the Burnham Solar Process, for the reason that it would virtually destroy the value of existing plants, constructed and installed to operate under more expensive processes, with an investment exceeding \$30,000,000.”

Mr. Carr: Is that subdivision 8?

Mr. Harrison: No, that is subdivision (h) on Page 76.

Mr. Carr: Thank you.

Mr. Harrison: Now, referring to Paragraph I:

“The Pacific Coast Borax Company also endeavored to preclude the development of the Burnham Solar Process, by means of their application for a lease of virtually all of the public land at Searles Lake, suitable for solar ponds, as heretofore stated. Had said application been granted it was the intention of the Pacific Coast Borax Company to construct solar ponds covering said entire area of 3,100 acres; and such ponds would have been of sufficient capacity to have enabled the Pacific Coast Bo-

(Testimony of George B. Burnham.)

rax Company, within five years, to have exhausted the entire chemical deposits of Searles Lake, and to have transferred it to the ponds of the Pacific Coast Borax Company; and thereby the Pacific Coast Borax Company would have secured virtually a permanent monopoly of the production of potash and borax in the United States, so far as concerns the [254] present known deposits thereof. It was upon this ground, among others, that Mr. Burnham protested against, and the Secretary of the Interior denied, said application for lease by the Pacific Coast Borax Company, acting through its subsidiary as hereinbefore stated."

Now, continuing with the affidavit which has been introduced in evidence, it is stated in the next paragraph at the bottom of Page 1:

"Also a large portion of the other allegations contained in the amended complaint, but which are too numerous to be listed in this affidavit; most of which show upon their face to have been based on the knowledge of affiant, particular attention being directed to the many allegations made in refutation of the charges, findings, statements and other acts of inspectors, attorneys and others who took part in the preferment of such charges, and in the conduct of the so-called hearing thereof."

(Testimony of George B. Burnham.)

Turning to Page 3, Line 19, the affidavit states:

“At the commencement of this affidavit, affiant stated that certain portions of the amended complaint are true as affiant’s personal knowledge. To the end that there may be no misunderstanding: as to the matters in the amended complaint which are not within the personal knowledge of affiant, affiant is reliably informed that they are true, and verily believes them to be true.” [255]

The matters to which we want to call the Jury’s attention as to which the affiant stated in this affidavit he believed to be true were all read to the Jury the other day, but I would like to ask the witness about one of these statements which he swears in this affidavit he believed to be true.

Q. I call your attention, Mr. Burnham, to the fact that in the amended complaint on Page 24—

Mr. Carr: Page 24?

Mr. Harrison: Yes, Page 24, Lines 11 to 20, the following statement is made, which was one of those in January of 1930, Mr. Burnham, you said you believed to be true.

Mr. Carr: Page what?

Mr. Harrison: That is the amended complaint.

Mr. Carr: Yes, but what page?

Mr. Harrison: Page 24, Line 11.

Mr. Carr: Yes.

Mr. Harrison: I am quoting now:

“That the difficulties encountered by Mr.

(Testimony of George B. Burnham.)

Burnham in marketing said small amount of borax then on hand were created by the afore-said competitors of the Burnham Chemical Company for the express purpose, among other things, of discrediting the Burnham Chemical Company and furnishing some false and fictitious ground upon which a fraud order could be based; and that said monopolistic restraint of the commerce in borax was and is a flagrant [256] violation of the laws of the United States, and could and should be penalized and prohibited by criminal and civil proceedings instituted by the United States; and Dr. Stewart further knew that said circumstances demanded the prosecution of the Borax Trust under the Antitrust Laws of the United States, but did not warrant or justify the prosecution of the Burnham Chemical Company or Mr. Burnham under the Postal Laws of the United States."

Q. I think you have testified, Mr. Burnham, the use of the term "Borax Trust" referred to these defendants, did it not?

Mr. Carr: Which defendants?

Mr. Harrison: The defendants American Potash & Chemical Company and Burnham Chemical Company.

The Witness: In the colloquial sense.

Mr. Carr: What was that?

Mr. Harrison: He says "in the colloquial sense."

(Testimony of George B. Burnham.)

Mr. Carr: He referred to the American Potash——

Mr. Harrison: American Potash & Chemical Company and Burnham Chemical Company.

Mr. Carr: Yes, and P.C.B.

Q. (By Mr. Harrison): Before we get to the sense in which it is used, when you used that particular language, "The Borax Trust," you did mean these two companies? A. Yes.

Q. Did I understand you to say that was used in the colloquial sense? [257]

A. Yes, that was the common expression for the two companies; in fact, all over Europe they called them "The Borax Trust," but not with any knowledge they were violating the Antitrust Laws of the United States.

Q. Isn't it a fact you used the word "Trust" in this sense to designate people who were violating the Antitrust Laws?

A. This is what Dr. Stewart contended.

Q. Oh, so that was it. You claim that Dr. Stewart knew that the circumstances demanded the prosecution of the Borax Trust under the Antitrust Laws?

A. Mr. Townsend drew this up. I believe that was what he had in mind.

Q. You read this, of course, before you signed it?

A. Yes, I read it over and Mr. Townsend asked me to sign it and I signed it, and I believed that

(Testimony of George B. Burnham.)

all these things—I did not affirm in my deposition—in my affidavit on January 14, 1930.

Q. I want to be fair with you, Mr. Burnham: I will read you that again. This is a passage from your affidavit of January, 1930:

“At the commencement of this affidavit, affiant stated that certain portions of the amended complaint are true of the affiant’s personal knowledge.”

You specified certain paragraphs, did you not?

A. Yes. [258]

Q. And you also said under oath:

“To the end that there may be no misunderstanding: as to the matters in the amended complaint which are not within the personal knowledge of affiant, affiant is reliably informed that they are true, and verily believes them to be true.”

You read that affidavit before you signed it?

A. Yes, but that belief is not based on any knowledge.

Mr. Carr: What was the answer?

Mr. Harrison: He says, “That belief was not based on any knowledge.”

Mr. Carr: Yes.

Q. (By Mr. Harrison): But it was your belief?

A. Based on the opinions of others, but the others didn’t have any knowledge either.

Q. You don’t know whether they had any knowledge or not?

(Testimony of George B. Burnham.)

A. I know Townsend had no knowledge.

Q. But you believed those to be true in January of 1930, did you not?

A. I had good reason to believe that they were true, but I did not have any knowledge whatsoever that they were true.

Q. But you believed them to be true?

The Court: Well, he signed the paper in which he said that.

Mr. Harrison: Yes, your Honor. [259]

Q. Now, do you recall the year 1933?

Mr. Carr: Have you finished with that?

Mr. Harrison: I will withdraw that last question.

Q. Your belief on this subject in 1930 was just as strong as it ever had been, was it not?

A. No.

Q. You signed this affidavit about your belief six months after your conversation with Mr. Zabriskie, did you not? A. Yes.

Q. Now, I want to continue reading the affidavit, Mr. Burnham. This is the affidavit still of January, 1930, Page 6 and Line 26. A. Yes.

Mr. Carr: What was the page again?

Mr. Harrison: Page 6 and Line 26, Mr. Carr:

“As our plan was completed, and our operations begun, the price of borax was still further reduced until, by the time affiant was ready to market its product, the price had been reduced as low as \$38 per ton, and the Burnham

(Testimony of George B. Burnham.)

Chemical Company could not make a profit at that price with a plant of only 5,000 tons capacity per annum; although it could have made a profit with its process, if operating a plant of 50,000 tons capacity; one of our competitors operated a plant of that capacity, on Searles Lake, during 1928, and thereafter. [260]

“It will be observed that deducting the cost of transportation from \$38 left only \$18; and from the latter sum, \$6 per ton must be deducted for the sacks which must be used in shipping borax. This left only \$12 net for the producer. The competitor of the Burnham Chemical Company at Searles Lake, which was largely responsible for this reduction in price, was producing approximately 50,000 tons of borax and 100,000 tons of potash per year. Affiant is of the opinion that such competitor could not and did not sell borax at such a low price, without a loss, unless an undue portion of operating expenses was charged to potash.”

Q. That competitor was the American Potash & Chemical Company?

A. American Potash & Chemical Company, yes.

Mr. Harrison: (Reading):

“Moreover, affiant learned, and states the fact to be that such competitor was using, and is still using, some of the essential and basic patents of the Burnham Chemical Company; and notice of infringement was duly served

(Testimony of George B. Burnham.)

after information thereof had been received. Affiant is informed and advised by the patent attorney of the Burnham Chemical Company that the operations of such competitor have been and now are clearly in violation of the patent rights of the Burnham Chemical Company; prosecution of suit for relief has been delayed because of lack of [261] funds.

“Affiant further states that except for the fact that said competitor was using the process covered by our company’s patents as afore-said, such competitor would not have been able to produce borax except at a cost greatly in excess of their present cost. Thus, the effect is that our patents have been used against us, to destroy us, at the time when our plant was completed and we were ready to operate.

“The immediate effect of this price war was to compel the Burnham Chemical Company to suspend operations at the end of the year 1928. It appears quite certain that this price war was intended to be only temporary, to accomplish some object beneficial to the authors thereof, and that normal prices will ultimately be restored.”

Q. In connection with that statement, I would like to ask you this question: When Mr. Zabriskie told you about over production you did not believe that was a temporary condition, did you?

A. What was the date of that?

(Testimony of George B. Burnham.)

Q. I am asking you about the Zabriskie conversation of May 29, when he told you that for every so many tons of potash that the American Potash & Chemical Company produced they had to produce so many tons of borax, you knew that was a permanent condition, did you not? [262]

A. Yes—no, I would like—

Q. And when he told you in May, 1929, that the cost of production at the Kramer deposit was a cheaper source than they had before, you knew that was a permanent situation, did you not?

A. Yes—I might add a little correction to that: production of American Potash & Chemical Company, it is true that for every three or four tons of potash that they produced, they produced about two tons of borax, but that doesn't mean it could always be permanent. They could redesign the plant.

Q. But there was no indication in May, 1929, it was temporary? It gave every indication of being permanent, did it not? A. Yes.

Q. Further, when you said in your affidavit of January, 1930: "It appears quite certain that this price war was intended to be only temporary, to accomplish some object beneficial to the authors thereof," you didn't have in mind the cheaper source of Kramer or the over production?

A. Read that again.

Q. Yes, I will read the two sentences again:

"The immediate effect of this price war was to compel the Burnham Chemical Company to

(Testimony of George B. Burnham.)

suspend operations at the end of the year 1928.

It appears quite certain that this price war was intended to be only temporary, to accomplish some object beneficial to the authors thereof, [263] and that normal prices will ultimately be restored."

You have my question, have you?

A. What was the question?

Q. The question is this: When you refer to the fact that the price war was intended to be only temporary to accomplish some object beneficial to the authors thereof, you did not have in mind the mere matter of cheaper production at Kramer that was permanent, or the mere matter of necessary production of borax in connection with potash, which was a permanent condition as far as you then knew?

A. The question is a little bit involved.

Q. If it is not clear I will withdraw it and ask you another question.

When you said that "It appears quite certain that this price war was intended to be only temporary," you meant, did you not, that it was intended by the American Potash & Chemical Company and the Pacific Coast Borax Company to be only temporary?

A. I don't know yet exactly what you are driving at.

Q. Perhaps I am not clear and I will withdraw the question and ask you another one.

A. This is my affidavit of January, 1930?

(Testimony of George B. Burnham.)

Q. Yes, your affidavit of January, 1930.

A. My affidavit of January, 1930, all right.

Q. At that time you said, "It appears quite certain that [264] this price war was intended to be only temporary." Whose intention were you referring to there?

A. The American Potash & Chemical Company and the other producers of borax.

Q. And the Pacific Coast Borax Company was the principal other producer, was it not?

A. Yes.

Q. Now, I would like to ask you to direct your attention to a statement in this affidavit on Page 9, Line 6:

"But our stockholders have reached the point where they insist unsurmountable handicap of the fraud order shall be removed. The far reaching injuries caused by this fraud order are too obvious to require specification. One incident will illustrate an injury which could hardly be anticipated. In June, 1928, the Burnham Chemical Company applied for a permit for some borax-bearing lands in the so-called Kramer District. Our application was contested; and the contest was tried before the United States Land Office at Los Angeles during July, 1929. Affiant was the first witness called in behalf of the Burnham Chemical Company, to prove the formal matters pertaining to our application. When affiant was turned over for

(Testimony of George B. Burnham.)

cross-examination, he was confronted with a certified copy of the fraud order, which was introduced in evidence for the stated purpose of impeaching the credibility and integrity of affiant and the Burnham Chemical Company. That certified copy was issued by the Post Office Department, with the approval of the Solicitor's Office, as shown by the initials endorsed thereon, which included the initials of Calvin W. As-sell, the attorney in the Solicitor's Office, who prosecuted the charges against the Burnham Chemical Company, as particularly set forth in the amended complaint."

In connection with those statements, I will ask you if you did not know at this time that damage had been caused to the plaintiff by reason of the Post Office fraud order?

A. I knew we were damaged all right.

The Court: We will take the morning recess at this time, ladies and gentlemen of the Jury. Please bear in mind the admonition of the Court as heretofore given to you.

(Recess.) [266]

Q. (By Mr. Harrison): I call your attention now to a paper that is dated November 6, 1925, addressed to "Dear Stockholder," and ask you whether that is a copy of a circular letter which you sent to all of your stockholders on its date.

A. Yes.

(Testimony of George B. Burnham.)

Q. And that is signed by you, Mr. Burnham?

A. Yes.

Mr. Harrison: We offer this in evidence as Defendants' Exhibit next in order.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit Q.)

Mr. Harrison: Defendants' Exhibit Q, ladies and gentlemen of the jury, which the witness said is a circular letter sent to the stockholders on November 6, 1925, addressed "Dear Stockholder," begins with the statement, "We have not yet begun to fight," and contains before the capitals this statement:

"No unjust action against this company has even the faintest chance of success. The company is ably defended, ably managed, aggressively going forward on the highroad to production of borax on a huge scale," and then in capitals, "and that is the very reason our competitors apparently instigated an unjust Post Office action against us—apparently they see the handwriting on the wall—they fear that the new Burnham plant is going to lead the world in borax production!" [267]

In that statement, Mr. Burnham, the words "our competitors" refer to the American Potash & Chemical Company and the Pacific Coast Borax Company, do they not?

(Testimony of George B. Burnham.)

A. I no doubt had them in mind.

Q. You told us about the interview with Mr. Emlaw on May 17, 1929. Had you ever had any personal conversation with Mr. Emlaw before this conversation with him in the previous December about the patent infringement?

A. I don't remember right now. I might have but I don't remember.

Q. You do not remember any conversation you had with him before December, 1928, so far as you can recall now?

A. As far as I can recollect right now.

Q. And you had no conversation with him between the time you called on him in December, 1928, and this conversation on May 17, 1929?

A. No.

Q. And the conversation of December 28th you have already described as having to do with that dispute about the patent? A. Yes.

Q. I call your attention to the affidavit which you filed in this case, and which you printed and distributed to your stockholders, and which was sworn to by you on February 19, 1946. I am referring for convenience to the printed copy which you have. [268]

Mr. Carr: What is the number of that?

Mr. Harrison: That is his affidavit in this case. I have not introduced it in evidence.

Mr. Carr: Pardon me.

Q. (By Mr. Harrison): I will ask you whether

(Testimony of George B. Burnham.)

on page 3 of the printed affidavit you swore to this statement:

“May 19, 1933. The Department of the Interior through its General Land Office at Los Angeles, California, finally denied plaintiff’s application for a lease on the Little Placer claim, which said plaintiff was counting on as a source of crude borax to renew the operations of its borax factory at Searles Lake. Affiant felt so reasonably certain that plaintiff would obtain the Little Placer claim that affiant’s suspicions were again aroused when its application for the Little Placer claim was denied. Affiant believed that probably defendants or some of them were violating the Antitrust Laws because if Defendant United States Borax Company finally acquired patent to the Little Placer claim, it would tend to further increase its monopoly of sodium borate in the said Kremer District.”

That is included in the affidavit you made, is it not? A. Yes.

Q. It is a fact, is it not, that your suspicions against the defendants were aroused again on about July 30, 1934? [269] A. Yes.

Q. What was it that then aroused your suspicions on July 30, 1934?

A. I had just learned that the Pacific Borax Group had purchased the borax property of the Western Borax Company, had just made or were just about to make a deal with the Sukow Borax

(Testimony of George B. Burnham.)

Company to acquire their borax, that is, a long term lease arrangement, and also that it looked doubtful that we would get the Little Placer, and that the Government was just about ready to give the United States Borax Company a patent on the Little Placer. In other words, on July 30, 1934, I realized that the Pacific Coast Borax group were getting almost a complete monopoly of the Kremer borax district.

Q. The Pacific Coast Borax Group, as you understood it, included the Borax Consolidated, Ltd., one of the defendants in this case, and the United States Borax Company, and also the Pacific Coast Borax Company, itself, is that true?

A. Yes, and one or two other companies.

Q. But certainly the defendants in this case?

A. Yes.

Q. We talked about the Kremer District; that is situated in San Bernardino County, in this State, is it not?

A. Yes—Wait, Kern County.

Q. Excuse me, in Kern County, and borax obtained there from the ground, from mines, as distinguished from the source in [270] Searles Lake, where it is extracted from the lake brine, isn't that true?

A. Yes.

Q. These discoveries of sodium borate in the Kremer District were made about 1925, were they not?

A. Yes.

Q. And operations began in the Kremer District about 1926 or about the end of 1926 or the early part of 1927?

A. Yes.

(Testimony of George B. Burnham.)

Q. Before you made these discoveries in July of 1934, or thereabouts, there were three companies operating in the Kremer District, were there not, that is to say, the Pacific Coast Borax Company had its mine and the Western Borax had its mine, and Dr. Suckow or his company had his mine?

A. Yes.

Q. There were three mines? A. Yes.

Q. So in 1934 you discovered that the Borax Consolidated group, including the Pacific Coast Borax and the others, had acquired the Western property and had made some arrangement with the Suckow people and were about to get the Little Placer? A. Yes.

Q. And that aroused your suspicion and belief that they, having succeeded in doing those things, were about to acquire a monopoly of the sodium borate deposits?

A. It aroused my suspicions. [271]

Q. With respect to the brine source of deposit, the only place where brine borax was produced in any large quantity was from Searles Lake, itself, isn't that true? A. Yes.

Q. And the greater part of the operations on Searles Lake had been conducted for many years by the other defendant, American Potash & Chemical Corporation, isn't that true? A. Yes.

Q. Your suspicions having been aroused against these defendants on July 30, 1934, you consulted your attorneys, did you not? A. Yes.

Q. At that time Mr. Heney had been appointed

(Testimony of George B. Burnham.)

a judge of the Superior Court of Los Angeles County? A. That is right.

Q. It was Judge Heney? A. Yes.

Q. You went to see him? A. That is right.

Q. And you also went to see Mr. B. D. Townsend, his associate, who had appeared for you in the suit in Nevada? A. Yes.

Q. You have a note in your diary under date of July 30, 1934, with reference to your conversation with Mr. Townsend, have you not? [272]

A. That is right.

Q. Will you produce and read it to the jury, please?

Mr. Carr: What is the date?

Mr. Harrison: July 30, 1934.

The Witness: Yes, I found it now.

Q. (By Mr. Harrison): We read some of that to the jury the other day, and if you will check with me I will read the part that has already been read and you can go on from there, in order to save time:

“Senator Wagner, of New York, advocates redistribution of wealth. Senator Nye fighting the administration. July 30, 1934. Discussion with B. D. Townsend Kremer case and suit against the Pacific Coast Borax Company for the patented land, claiming that it is held in trust for us.”

That is the land they held in the Kremer District, isn't it? A. Yes.

Q. And that is a memorandum of a discussion

(Testimony of George B. Burnham.)

with Mr. Townsend about the possibility of suing the Pacific Coast Borax for that land?

A. Yes.

Q. On the ground it was held in trust for you?

A. Yes.

Q. "Replacement theory of P.C.B. knocked out," and then there are some passages about geological facts, and then there is the note: [273]

"Take set of documents to New York."

A. I don't see about the geological facts.

Q. Perhaps not. Perhaps that is my error. There is a statement there, "Take set of documents to New York."

A. To Washington, D. C.

Q. You were planning at that time to go to Washington, D. C., were you not? A. Yes.

Q. "Look in the bank deposit vault for the Mather letter, B. C. Company vault or G. B. B. vault"—that is Burnham Company vault, or George B. Burnham vault? A. Yes.

Q. "Townsend said could use Mather letter." We referred to that the other day, did we not?

A. Yes.

Q. Proceeding further, "Possible alternative attorney, H. Stanley Hendricks in the Southern Building, suggested by Townsend. Worked with Townsend in Government cases." That represents the suggestion by Mr. Townsend? A. Yes.

Q. That you might employ Mr. Hendricks?

A. That is right.

Q. And you recalled the fact that Mr. Townsend

(Testimony of George B. Burnham.)

had written Mr. Hendricks back in July, 1928, about the price cuts, had he not? [274]

A. Yes.

Q. "Townsend headed for recovery," is the next note.

A. That is right.

Q. That refers to his health? A. Yes.

Q. "Says 25 or 33 percent interest may be necessary." That refers to his compensation, I suppose, does it? A. Yes.

Q. "Townsend thinks Wheeler, of Montana, might be interested to help us as he has socialistic tendencies"—If I am wrong in any of this tell me—"Norris, of Nebraska, and Johnson, of California, might help us. Heney would help us through Johnson. Believes Norris, of Nebraska the best. Couzens, of Michigan, might help. Has his money in non-taxable Government bonds. Townsend thinks Wagner might be too drastic. Going to see if I can arouse the interest of several other senators to back you."

That represented a statement of Mr. Townsend to you?

A. Yes, that is in quotation marks.

Q. That is in quotation marks, and those other statements about senators represented suggestions of Mr. Townsend, did they?

A. Yes, that is correct.

Q. "Believes Nye would be good, too, but take up with him new head of the Public Lands Committee. Get more information [275] from Zuckow about the price of borax."

(Testimony of George B. Burnham.)

You had been talking, had you not, and continued to talk with people connected with the Suckow Company about the acquisition of their properties by the Pacific Coast Borax Company, Mr. Burnham?

A. Yes, I had talked to Suckow, and I understood that they were making a deal with the Pacific Coast Borax Company, a long-time lease on their property.

Q. And that was one of the circumstances that aroused your suspicion? A. Yes.

Q. Going on with the notes, there: "McAdoo might be good. Took a shot at P. C. B. Neblitt sets up a charge of monopoly." That refers to a statement to you by Mr. Townsend? A. Yes.

Q. And he told you, did he not, that Mr. Neblitt, who was Senator McAdoo's partner, in a hearing of a Senate Committee had charged the Pacific Coast Borax Company with monopoly?

A. I don't remember any details except he said Neblitt had charged monopoly.

Q. You knew that Mr. Neblitt was Senator McAdoo's partner, did you not?

A. I can't remember.

Q. As a matter of fact, didn't you make a note about Mr. Neblitt's name at a later part of your diary?

A. Yes, I may have done that. I guess they are connected in some way.

Q. Your attention had been called to the fact that Mr. Neblitt had publicly charged the Pacific

(Testimony of George B. Burnham.)

Coast Borax Company with being an illegal monopoly, isn't that a fair statement?

A. Yes, I think Townsend may have said that there had been some——

Mr. Carr: You are referring to this conversation——

Mr. Harrison: With Mr. Townsend.

Mr. Carr: Yes, only to that, not the statements made by other parties.

Q. (By Mr. Harrison): Mr. Townsend certainly told you that, didn't he?

A. Townsend said that Neblitt had charged them with monopoly, yes.

Q. And he also told you McAdoo had taken a shot at the P.C.B., didn't he?

A. I don't quite remember about that. It isn't here.

Q. Will you read me what it says about McAdoo?

A. "McAdoo might be good—" Oh, that is right. "Took a shot at the P.C.B." But I didn't know what he took a shot at him on.

Q. That is immediately followed by the statement that, "Neblitt sets up a charge of monopoly," isn't that right.

A. Yes, that is right.

Q. Did you know at that time Mr. Neblitt was acting as [277] counsel for a committee investigating monopolies in Southern California?

A. Well, I didn't know much about it. I hadn't been in Los Angeles for a year and had not followed it very closely.

Q. Did you find out from the newspapers in San

(Testimony of George B. Burnham.)

Francisco which you received that such charges had been made public at that time?

A. My memory is very vague on that, I don't know.

Q. Let us go ahead then.

"Ickes is Secretary of the Interior" is the next item, is it not? A. Yes.

Q. And the next item is, "Get copy of Borax Consolidated vs. Suckow, et al., United States District Court, Post Office Building, Public Document filed," also by Suckow's other attorney, "Prior entry"; that is correct as an entry, is it not?

A. Yes.

Q. Does that refresh your recollection that Mr. Townsend recommended that you should get a copy of this Borax Consolidated against Suckow?

A. Yes.

Q. Did you do so? A. I don't believe I did.

Q. Then the next item is, "Look up patent suit against Trona." Did you look up that patent suit?

A. Oh, yes. [278]

Q. Trona was the former name of the American Potash & Chemical Corporation, was it not?

A. Yes.

Q. And it was often referred to as Trona, even after the change of name? A. Yes.

Q. Is this the next entry there:

"Ask Consolidated vs. Suckow Mines Consolidated in Equity 310, Borax Consolidated vs. Ruth E. Suckow, page 12."

A. Yes.

(Testimony of George B. Burnham.)

Q. Those entries are there? A. Yes.

Q. And they were things Mr. Townsend thought you ought to look into? A. Yes.

Q. You went to Washington almost immediately after that interview, did you not, in August, 1934?

A. That is correct.

Q. And you brought with you a letter of introduction from Judge Heney to Mr. Louis Glavis, did you not? A. Yes.

Q. Who was Louis Glavis?

A. He was in the Department of the Interior in charge of investigations.

Q. He had gained considerable repute in connection with the [279] Ballinger controversy, did he not, as an investigator? He was well known?

A. I had heard that he had.

Q. Mr. Heney told you that he knew him well?

A. Yes.

Q. And that he would give you a letter of introduction to Mr. Glavis? A. Yes.

Q. And you were going back in connection with your suspicion that a monopoly was being obtained in the Kramer District by the Pacific Coast Borax Company, isn't that true?

A. Yes, in the Kramer District, but not necessarily a monopoly of the Borax business.

Q. Have you with you, Mr. Burnham, a copy of that letter of introduction? While I am looking for it you may have a copy.

Mr. Carr: Was it introduced?

Mr. Lasky: No. 28.

(Testimony of George B. Burnham.)

Mr. Harrison: Unfortunately these are not in order.

The Witness: Here is a copy.

Q. (By Mr. Harrison): Have you a copy?

A. Yes.

Q. We will use that at present and save a little time.

Mr. Carr: You will be referring to Defendants' 28?

Mr. Harrison: Yes, exactly. [280]

Q. Now, Judge Heney signed the original of which you handed me a copy of this letter of introduction?

Mr. Lasky: Here you are (handing a document to Mr. Harrison).

Q. (By Mr. Harrison): This is the office copy that Mr. Heney gave you, is it not? A. Yes.

Mr. Harrison: You can keep that for your file. I will offer this letter, one from Judge Heney to Mr. Burnham, and one from Judge Heney to Mr. Glavis.

(The documents in question were thereupon received in evidence and marked Defendants' Exhibit R.)

Mr. Harrison: Letter from Heney to Burnham is dated August 3, 1934, and the same date on the other letter, August 3, 1934.

Ladies and gentlemen of the jury, Defendants' Exhibit R consists, first of all, of a letter on the letterhead of the Chambers of the Superior Court, Los Angeles, California, Francis J. Heney, Judge,

(Testimony of George B. Burnham.)

dated August 3, 1944, to G. B. Burnham, 2823 Kelsey Street, Berkeley, California:

“Dear Burnham:

Enclosed find an original letter of introduction to Louis Glavis, together with a carbon copy thereof for your files.

With best wishes for your success in this matter, [281]

I am,

Very truly,

FRANCIS J. HENEY.”

And the other is a copy of a letter dated August 3, 1944, addressed to Louis Glavis, Bureau of Investigation, Interior Department, Washington, D.C.

“Dear Louis:

This will introduce my friend and former client, George B. Burnham, who desires to talk with you about a matter which I think it is well worth your while to investigate, to-wit, the matter of the Pacific Coast Borax Company having established, continued and maintained an evil and strangling monopoly in the borax business. It is a foreign-controlled corporation, and borax has become a material of such general use in the United States that a monopoly thereof is oppressive in many lines of business.

Mr. Burnham was an assistant professor of chemistry at Berkeley in the State University

(Testimony of George B. Burnham.)

of California before he got interested in the borax business. I think he is about as well posted as any man in the United States in regard to the borax business, and in relation to the question of the monopoly thereof by the Pacific Coast Borax Company.

With kind regards,

Yours very truly,

FRANCIS J. HENEY." [282]

Q. Now, then, you went East and called on Mr. Glavis, did you not? A. Yes.

Q. You told Mr. Glavis, did you not, that these defendants, the American Potash & Chemical Company and the Pacific Coast Borax Company, had cut the price of borax in the month of June, 1928, in the very month that your company had started production?

A. I never told him that in reciting the history of the Burnham Chemical Company. [282-a]

Q. I am not concerned with that; but you did in fact tell him that, did you not?

A. Yes, I believe I did.

Q. Did you also tell him that after you had sold your borax toward the end of 1929, about November of 1929, these same companies then increased the price of borax by one-third?

A. Yes.

Q. I would like to turn to your diary for October 11, 1934, with respect to an interview you had with Mr. Townsend.

(Testimony of George B. Burnham.)

Mr. Carr: What month was that?

Mr. Harrison: October 11, 1934.

Mr. Carr: Thank you.

Q. (By Mr. Harrison): Have you that, Mr. Burnham? A. Yes.

Q. Will you read it, please, the memorandum of your conversation with Mr. Townsend on that date?

A. At the top of the sheet it states, "October 11, 1934: Discussion with Townsend. Application for permits overlooks transactions concealed."

Q. If you will stop at that point, please, I will ask you what the notation, "Transactions concealed" means; in other words, what did Mr. Townsend tell you about transactions having been concealed?

A. The notes are very brief, but I think that Townsend was discussing the fact that the United States Borax Company had [283] concealed the fact that they had discovered sodium borate in their application for a patent to the land.

Q. Did he say in effect that they concealed in that application for a patent the fact that they had discovered sodium borate and yet they went ahead and prosecuted their application?

A. I think that was what Townsend had in mind.

Q. Did he not express the opinion that they had in their effort to get a patent to the land in the Kramer District, been guilty of concealing facts from the Government? A. Yes.

Q. Did he not say that it looked as though they

(Testimony of George B. Burnham.)

were not honest and aboveboard in their transactions with the Government? A. Yes.

Q. And you told him that you thought that the Burnham Chemical Company had not been open and aboveboard when they concealed from the Government the fact that they had sodium borate, did you not? A. Yes.

Q. And you believed that to be the fact?

A. Yes.

Q. And didn't it occur to you when you told Mr. Townsend that they had not been open and aboveboard with the Government that Zabriskie and Emlaw might not have been open and aboveboard in telling you about the price cuts in 1929?

A. That thought didn't occur to me, no. [284]

Q. Will you turn to your diary in 1936 for February?

Mr. Carr: What date?

Mr. Harrison: February: I don't think the witness has a date, but he has a note somewhere in February, is that correct, Mr. Burnham?

A. Yes.

Q. That you consulted a lawyer down in Los Angeles by the name of Hess. It is in the black book marked No. 14, Mr. Lasky tells me.

A. Yes, sir, I have it.

Q. What is your entry about consulting Mr. Hess? About what date is that, as near as you can fix it?

A. It is probably about February of 1936—some time in February.

(Testimony of George B. Burnham.)

Q. And Mr. Hess was a lawyer in Los Angeles?

A. Yes.

Q. All right, will you read the entry?

A. This concerns a conversation with Mr. Hess.

It starts at the top of the page by saying: "Things to do with Washington. Confer with Edward H. Reede of Washington, D. C., on why have not made a success. Advise Hess address in Washington, D.C. 406 Rives-Strong Building. Check everything under L. A. 046240 in the Land Office patent issue to Dowsing."

Q. What was that?

A. "Patent issue to Dowsing"—D-o-w-s-i-n-g—"on April 9, [285] 1927. This info. for Hess. The north half of Section 24 etc. south quarter, northeast quarter, north half Section 24 etc. Kramer District. Correspondence urging speed in granting patent by some department deputy. Get the dates of transactions actual filing dates of applications. Also 045946 to U. S. Borax Co., southwest quarter, southwest quarter of northeast quarter. Little Placer highly vulnerable."

Q. "Vulnerable," is that?

A. Yes, "Vulnerable. See inside correspondence. If a deputy is a former employee of P.C.B. it would be valuable info."

Q. Now, that last statement, "If a deputy is a former employee of P.C.B. it would be valuable information," was a suggestion to the effect that if a deputy in the Government had been a former employee of the Pacific Coast Borax Company, that

(Testimony of George B. Burnham.)

would be a valuable bit of information to you, isn't that true?

A. That is what, apparently, Mr. Hess had in mind.

Q. And that referred to a deputy in the Land Office? A. Yes.

Q. And Mr. Hess told you, did he not, that he was rather suspicious that the granting of patents in the Little Placer to the United States Borax Company might be irregular or possibly fraudulent?

A. I don't know that he said that in those words, but that is probably what he meant.

Q. I will show you Page 353 of your deposition referring to that conversation—— [286]

Mr. Carr: Page 353?

Mr. Harrison: Page 353, Mr. Carr.

Mr. Carr: Thank you.

Q. (By Mr. Harrison): Page 353, Line 21, Mr. Burnham: Have you that? A. Line 21?

Q. Yes. I will read it to you and you can tell me whether or not you so testified:

“Q. Now, on that entry that if the deputy were a former employee of the Pacific Coast Borax Company, that would be information, do you refer to a deputy in the Land Office?

A. Yes.

Q. What kind of a deputy?

A. Well, Mr. Hess was rather suspicious that the granting of patents on the Little Placer to United States Borax Company, which we

(Testimony of George B. Burnham.)

all thought they were about to get, might be irregular and might be fraudulent.”

You so testified, did you not?

A. Yes.

Q. Have you the letter from Senator Pitman on September 14 that same year?

Mr. Carr: A letter from Senator Pitman?

Mr. Harrison: A letter from Senator Pitman to the Burnham [287] Chemical Company.

Mr. Carr: What date was that?

Mr. Harrison: September 14, 1936, and the reply under date of October 20, 1936.

Mr. Carr: You mean the reply of the Burnham Chemical Company?

Mr. Harrison: Yes.

Q. You kept those, Mr. Burnham; they were not turned in at the deposition? A. Yes.

Q. Will you give me those, please?

A. These are original carbon copies. They are the only ones we have.

Mr. Harrison: All right. We offer in evidence, first of all, the letter from Senator Pitman to the Burnham Chemical Company, dated September 14, 1936, as defendants' exhibit next in order.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit S.)

Mr. Harrison: We also offer in evidence the reply to that letter addressed to Senator Pitman and signed “Burnham Chemical Company, By.....,

(Testimony of George B. Burnham.)

President." That reply was in fact signed by you, was it not, as President of the Company?

A. Yes. [288]

(The document in question was thereupon received in evidence and marked Defendants' Exhibit T.)

Mr. Harrison: Defendants' Exhibit S is a letter on the letterhead of the United States Senate Committee on Public Lands and Surveys, Washington, D. C., September 14, 1936, addressed to the Burnham Chemical Company, 6066 Rockridge Boulevard, Oakland, California, and reads as follows:

"Gentlemen:

As you may know, Senate Resolution 274, adopted June 18, 1936, (copy of which is enclosed), authorized and directed the Committee of Public Lands and Surveys of the United States Senate to institute and conduct a thorough investigation of all phases of the potash industry, hold hearings, and report at the next session of Congress the results of its investigations, together with its recommendations, if any, for necessary legislation.

For this purpose the powers of the whole Committee have been delegated to a Subcommittee with myself as Chairman and Senators Wagner, Ashurst, Hatch, and Carey as members.

Before commencing hearings it is desirable

(Testimony of George B. Burnham.)

to assemble as much information as possible from interested parties to show the actual status of the industry today and what, if anything, may be done to improve the present and [289] future status of the interested producers, distributors and consumers of potash in the United States, giving due consideration to the conservation of the mineral resources of the public domain and the related questions of imports and exports.

At your early convenience we would, therefore, like you to submit a statement containing such data as you feel should be required of you by the Subcommittee so that it may be fully advised in the matter of your past, present and contemplated interests in the potash industry. We would also appreciate constructive criticism of past or present conditions and recommendations for future action based on your experience with potash.

If we can secure the hearty cooperation of all concerned, we hope to evolve a report which will be of real value.

Kindly address your reply, as soon as convenient, to me at Washington.

Very truly yours,

/s/ KEY PITTMAN,

Chairman, Subcommittee on
Potash Investigation."

And Defendants' Exhibit T is a letter of October 20, 1936, addressed to the Honorable Key Pittman,

(Testimony of George B. Burnham.)

Senate Office Building, Washington, D. C. That is a long letter and I only [290] desire to read some extracts from it, and if you will take the letter, Mr. Burnham, I will read from my copy. On Page 2 the letter contains this statement:

“Foreign-owned corporations are practically the only producers of potash in America. They are also the principal producers of borax and are spoken of as the English Borax Trust. The world’s potash market is controlled by the German Potash Trust and apparently the English Borax Trust cooperates with the German Trust in the control of the market. As soon as any Government lease begins producing potash the Trust will no doubt cut the prices of potash and the lessees should have some kind of government protection against such competition. A similar situation occurred when we started producing borax. The very month we started on borax production, drastic cuts in the price of borax occurred”.

Then on Page 4 the last paragraph:

“Yet what happened? Just this, the Post Office Department of the United States Government, inspired by what we believe was misinformation based upon ignorance and probably influenced by our competitors, imposed a Post Office fraud order upon the company.”

(Testimony of George B. Burnham.)

Then on the next page, on Page 5, the first paragraph:

“The very month we started operations saw the beginning of a price war between the two largest producers of borax [291] (both English controlled corporations), which drove the selling prices down to the unbelievable price of \$18 per ton F.O.B. plant.”

Q. Those two largest producers are, of course, American Potash & Chemical Company and Pacific Coast Borax Company, are they not, Mr. Burnham?

A. Yes.

Mr. Harrison: (Reading):

“This was \$30 to \$40 lower than borax had ever sold before in its history. No producer could make profits at that price and a new company like ourselves without financial reserves could not continue indefinitely to carry the losses entailed in operation. It would almost appear that the cut in price of borax was purposely timed to start the very month we started borax production.”

That is all I think I care to read from that letter.

Mr. Carr: We will read the balance:

Mr. Harrison: Shall I proceed to another matter, if your Honor please?

The Court: Perhaps we might take the noon recess at this time.

Ladies and gentlemen of the Jury, we will resume

(Testimony of George B. Burnham.)

the trial at two o'clock. Please bear in mind the admonition of the Court heretofore given to you.

(Thereupon a recess was taken until two o'clock P.M.) [292]

Afternoon Session, April 1, 1947, 2:00 P.M.

GEORGE B. BURNHAM

recalled.

Cross-Examination
(Resumed)

By Mr. Harrison:

Q. Now, Mr. Burnham, this morning you were talking about your trip East in 1934. You started East in August, 1934, following your interview with Mr. Townsend on July 30, 1934, did you not?

A. Yes.

Q. When you went East did you bring with you a copy of the amended complaint in the fraud order suit?

A. I don't remember, but I might have.

Q. Did you bring with you a copy of your affidavit which was introduced in evidence this morning, and which you made in January, 1930, before the District Court? A. No.

Q. If you will turn to your deposition I will ask you if you testified as follows——

Mr. Carr: What page?

(Testimony of George B. Burnham.)

Mr. Harrison: Page 264, line 13.

“Q. When you went back East you showed that Mather letter to Glavis, did you not?

A. No.

Q. You took it East with you?

A. Yes. [293]

Q. What were the other documents you took East with you?

A. I don't remember. I took everything that I thought might be useful.

Q. You took a copy of the printed amended complaint in the Carson City suit, did you not?

A. Maybe. I presume I did.

Q. You took a copy of the affidavit you filed in the Carson City suit dated March 14, 1930?

A. Yes.”

You so testified, didn't you?

Mr. Carr: Let us follow on.

Mr. Harrison: Yes, Mr. Carr, just a minute.

“Mr. Lasky: This was later.

A. I probably did. I don't remember what I took.

Q. I suppose you took with you copies of the ‘Oil, Paint & Drug Reporter’ showing the price cuts of June, 1928?

A. I don't remember taking that.”

Did you so testify?

A. Yes.

(Testimony of George B. Burnham.)

Q. On your present recollection would you say that you probably did take that affidavit?

A. That affidavit was a typewritten document filed in Carson City, and I doubt very much that I took that. I took the amended complaint, because that was printed and there were lots of copies, but special copies that were typewritten and [294] perhaps only one or two available anywhere, I doubt if I took that.

Q. So that whereas in your deposition you thought you probably took it, now you think you probably did not?

A. After giving it more thought I rather think I did.

Mr. Carr: He says, "I don't remember what I took."

Mr. Harrison: He said he probably did. The deposition speaks for itself. I have read it fully. I am trying to get the witness' varying recollection from time to time.

Mr. Carr: Read all of his answer, Mr. Harrison.

Mr. Harrison: I have, Mr. Carr. If you want to read anything I have not read, I will be glad to have you do it.

Q. Now, Mr. Witness, when you were back there I think you testified this morning that you told Mr. Glavis about the price cuts in 1928, did you not?

A. Yes.

Q. And you told him about the fact that they had occurred at the time you began production, did you not?

(Testimony of George B. Burnham.)

A. Well, I related to Mr. Glavis the history of the Burnham Chemical Company, and I probably related those things in relating the history. I don't specifically remember taking those particular points to him.

Q. What is your best recollection at the present time as to whether or not did you tell him that the price cuts had occurred at the time you began production? [295]

A. In any ordinary accounting the Burnham Chemical Company, the history of the Burnham Chemical Company, I told him the price cut occurred the month we started production; but to put my finger on definitely, I do not remember after all of these years.

Q. In other words, you have no recollection now as to whether you told him or not? I just want to get your present recollection. What is your best recollection: Did you or did you not tell him about the price cuts?

A. Well, I told him the history of the company, and so I must have told him about the price cuts.

Q. Your best recollection is that you did tell him?

A. To the best of my recollection, yes.

Q. And you attached significance, did you not, to the fact that those price cuts occurred?

A. Yes.

Q. At that time? . A. Yes.

Q. Will you show me your diary entry about

(Testimony of George B. Burnham.)

a conversation with Mr. Townsend on October 11, 1934? A. Yes, I have it here.

Q. Will you read that, please, about the Goldfields? A. October 11, 1934?

Q. Yes, sir.

A. Oh, yes. Shall I read the whole article? [296]

Q. I am only interested in that part dealing with the Goldfields control. Let me ask you, first of all, that is a memorandum of a conference with Mr. Townsend on October 11, 1934, is it not?

A. Yes.

Q. Refreshing your recollection by that memorandum, what did Mr. Townsend tell you about the control of the Borax Consolidated, Ltd., by Goldfields?

A. "Plaintiff's Goldfields Consolidated of South Africa may control the Borax Consolidated. Believe maybe there is a report on it."

Q. Now, Goldfields, Consolidated, as you knew, were in control of the American Potash & Chemical Company, were they not?

A. That is what I understood at that time.

Q. Mr. Townsend told you at that time that they might also control the Borax Consolidated, Ltd.?

A. That maybe they might, yes.

Q. And the Borax Consolidated, Ltd., in turn controlled, as you knew the Pacific Coast Borax Company? A. Yes.

Q. While you were in the East, in the fall of 1934, or about that time, you wrote some letters to the Secretary of the Interior, did you not?

A. Yes.

(Testimony of George B. Burnham.)

Q. Will you produce, please, the letter of September, 1934, to [297] the Secretary of the Interior, that is, September 21, 1934?

A. Yes, I have a copy here.

Q. Will you let me have it, please?

A. I guess this is a letter more clear.

Q. Do you have another copy in your hand?

A. Yes, I have another copy.

Mr. Harrison: We offer this in evidence, if your Honor please, a letter of Burnham Chemical Company to the Honorable Harold R. Ickes, dated September 21, 1934.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit U.)

Mr. Harrison: And from my copy I will read to the jury, Mr. Burnham, and you can follow at the bottom of page 1.

This is addressed to the Honorable Harold R. Ickes, Secretary of the Interior, Washington, D. C., and is dated September 21, 1934, on the letterhead of Burnham Chemical Company:

"In the summer of 1928 this company, after overcoming many difficulties, succeeded in completing its borax plant upon its lease property and produced and sold 1427 tons of refined borax. No sooner had we started production than a most drastic cut in price of borax occurred. Prior to our production borax sold for

(Testimony of George B. Burnham.)

about \$50 per ton f.o.b. Searles Lake, California. Immediately upon starting production in June, 1938, the price was cut to about \$30 per ton f.o.b. Searles Lake. This was the lowest price in the history of the borax business. Soon thereafter it was cut even more, until finally the price was reduced to \$18 per ton. Our cost of production was \$26 per ton, and therefore it was impossible for us to continue to operate and produce borax. The prevailing price of borax has remained at approximately this same low figure of \$18 per ton f.o.b. plant.

The reason our competitor has been able to maintain this low price is because of his illegal acquisition in 1926 of the most valuable and most economical source of sodium borate in the world. This is a new source of borax and is known as the Kramer Borax Deposit."

The competitor referred to in the last paragraph, of course, is Pacific Coast Borax Company, is it not?

A. Yes.

Q. Reading further from page 5 of the letter, the second paragraph:

"Therefore, by illegally acquiring a source of cheap borax supply our competitor, the Pacific Coast Borax Company, have made it impossible for us to produce borax at a profit at present prices.

It is not fair nor just that the Government should now take steps to cancel our lease upon

(Testimony of George B. Burnham.)

Searles Lake due to the non-payment of our rent, or the non-production of the minerals thereon when the cause of such default [299] is due to the false and deceitful action of our competitor, whose main object is to get patent to sodium borate lands and to drive out all competition and hold a monopoly of the borax business. Nor is it fair that the Government continue to the end that the borax trust can obtain continued ownership and thereby drive out of business a Government lessee, such as ourselves, who must pay a royalty on production and who obtains its lands and mineral deposits by legal and lawful methods.”

That letter was signed by you, was it not?

A. Yes.

Q. Have you the letter of November 28, 1934?

Mr. Carr: To the Secretary of the Interior?

Mr. Harrison: Yes, Mr. Carr, that is right. Before I leave that other letter there is one further passage:

“For six years we have been defending the interests of the people of the United States against the illegal practices of the borax trust. We had to carry on our battle with meager funds, whereas, the borax trust had unlimited money at its disposal. After the six years of struggle in our fight for the people’s interest, is it fair to cancel our Searles Lake lease because we have no money left to pay the rent?”

(Testimony of George B. Burnham.)

Q. Do you have that letter of November 28th?

A. I do not seem to have a copy here. [300]

Mr. Harrison: Have you a copy, Mr. Carr? I have a certified copy from the Department of the Interior. It is bound up with a lot of other things. May I take this apart?

Mr. Carr: I have one of November 18th.

Mr. Harrison: November 28th.

Mr. Carr: I haven't got that.

Mr. Harrison: I have here a certified file, certified under the seal of the Secretary of the Interior. May I remove this?

Mr. Carr: Oh, yes, surely.

Mr. Harrison: We offer in evidence, if the Court please, this certified copy.

Mr. Carr: Have you any copies, Mr. Burnham, of that letter?

Mr. Burnham: No, I do not seem to have that with me.

Q. (By Mr. Harrison): I will show you this letter, Mr. Burnham, certified to by the Department of the Interior, and ask you whether that is a photo-static copy of a letter with your signature.

A. Yes, sir, it is my signature.

Q. That was mailed about its date to the Department of the Interior, was it not? A. Yes.

Mr. Harrison: We offer this letter in evidence, if the Court please. [301]

Mr. Carr: May I take a look at that first?

Mr. Harrison: Yes, surely.

(Testimony of George B. Burnham.)

(The document in question was thereupon received in evidence and marked Defendants' Exhibit V.)

Mr. Harrison: From this letter we read to the jury the following passages. I am reading from a copy that Mr. Carr looked at:

"Immediately upon our entering into the production of borax the price of borax fell from \$50 to \$18 per ton f.o.b. Searles Lake, \$18 per ton below our cost of production, which is \$26 per ton in our present size of plant, so we had to shut down.

There are only three principal producers of borax in the world today, namely, the Pacific Coast Borax Company and the American Potash & Chemical Company, both controlled by English capital and known as the Borax Trust. In fact, they may be classed as one producer, since they both operate under English control. The West End Chemical Company at Searles Lake is the third producer. There are no other borax producers, because they have now all been bought out by the Trust."

Q. As a matter of fact, you referred this morning to the fact that you learned in 1934 that the Pacific Coast Borax had acquired the property of the Western Borax Company, did you not, Mr. Burnham? [302] A. Yes.

Q. And that they had also secured control over Dr. Zuckow's mine? A. Yes.

(Testimony of George B. Burnham.)

Q. And you knew at that time that the Pacific Coast Borax had been engaged in litigation with Suckow? A. Yes.

Q. You had discussed that litigation with Dr. Suckow, had you not? A. Some, yes.

Q. Didn't he tell you that his claim was that Pacific Coast Borax Company had forced his company into bankruptcy and thereby intending to eliminate him from competition?

A. Well, I don't know as he said all that, but he said he was in litigation in the bankruptcy proceedings, or something of that sort.

Q. Didn't he say in his opinion the Pacific Coast Borax Company was responsible for his troubles?

A. I don't remember that he said that.

Q. You did hear that at that time, did you not, or about that time?

A. Well, Townsend might have told me.

Q. Townsend told you on July——

Mr. Carr: He said he might have.

Q. (By Mr. Harrison): Yes, now I am asking you isn't it a [303] fact that Townsend told you on July 30, 1934, that there was this litigation in connection with the discussion of the monopoly of the Pacific Coast Borax Company?

A. Well, Townsend told me that the Suckow Borax Mining Company was involved in litigation with the Pacific Coast Borax Company, I believe.

Q. Didn't he advise you to look into that litigation for the purpose of obtaining evidence of their monopolistic control?

(Testimony of George B. Burnham.)

A. Well, he suggested that I get a copy of the complaint, but I did not have time to get it.

Q. Let us get down to the year 1937. You had some testimony on direct examination about a conversation in the year 1937 with Mr. Emlaw, did you not? A. Yes.

Q. I call your attention to the fact that in the original transcript of the deposition the question was asked you—and I am referring now to page 44 of your deposition; will you look at that?

A. Page 44? [304]

Q. That is the second line. Counsel had been examining you, I may say, Mr. Burnham, about the conversation of May 17, 1929, with Mr. Emlaw, and I am asking you now whether this isn't the fact that on your original deposition you were asked:

“Q. Did you ever talk to Mr. Emlaw again?

A. I don't remember. I know that I called at the office of American Potash & Chemical Company, but I don't remember of talking to Mr. Emlaw.”

And that when you re-read your deposition for the purpose of correcting it, you struck out the words “I don't remember” and made the answer read as follows:

“A. I know that I called at the office of American Potash & Chemical Company and I talked to Mr. Emlaw again on October 19, 1937.”

(Testimony of George B. Burnham.)

And you assigned as your reason for the change that when the question was first asked you didn't remember that particular conversation. That is the fact, is it not?

A. For the moment it had slipped my mind.

Q. So when you were first asked on your deposition whether or not you had talked to Mr. Emlaw you did not remember your conversation in 1937. That is a fair statement, isn't it?

A. Yes, momentarily I forgot that other visit.

Q. Now, let's come down to the year 1938: by the way, before we do, will you turn to your entry of October 3, 1937? [305]

Mr. Carr: Diary?

Mr. Harrison: Diary. yes, the entry of your meditations on October 3, 1937?

A. October 3, 1937? I have it here.

Q. Yes, and there is a memorandum of some mediations of yours, is there not? A. Yes.

Q. Will you read them?

A. "Would relinquish my stock if necessary. Everything that is done in the Land Office in the way of potash or borax is nearly always for the benefit of the Borax Trust."

Q. In making that memorandum at that time——

A. (Continuing): "always for the purpose of making the rich richer. I want to see the poor people or the people of small means get richer."

Q. Yes, that is the complete entry?

A. Yes.

(Testimony of George B. Burnham.)

Q. Now, in referring to the Borax Trust at that time and when you wrote that memorandum you were referring to these defendants, were you not?

Mr. Carr: Which defendants?

Mr. Harrison: The American Potash & Chemical Company and the Pacific Coast Borax Company, and the allied companies.

The Witness: Yes.

Q. Now, in September of 1937, the Post Office revived its [306] enforcement of the fraud order, did it not? A. Yes.

Q. And that circumstance aroused your suspicions again, did it not, with respect to whether or not your competitors were responsible for the Post Office action ?

A. Yes, I was beginning to wonder again if that might not be so, if they might not be behind that.

Q. Now, then, in 1938, isn't it true that you consulted an attorney about any possible claim you might have against the Pacific Coast Borax and the allied companies and the American Potash & Chemical Company with respect to the damage done you as the result of the price cuts in 1928?

A. Yes.

Q. In 1938, in the early part of 1938, isn't it true that three things occurred which revived your belief as to the responsibility of these companies for the price cut and the damage to you: in the first place, this fraud order had been reinstated the previous September, had it not? A. Yes.

(Testimony of George B. Burnham.)

Q. In the second place, your lease had been terminated by the Department of the Interior, had it not? A. Yes.

Q. In the third place, an appeal which you had made to the President of the United States had been denied, had it not, by the beginning of 1938?

A. Yes.

Q. And isn't it a fact that those three circumstances rearoused your suspicions? A. Yes.

Q. Now, then, will you turn to a diary entry of February 4, 1938, stating your meditations?

A. I have them here. Shall I read them?

Q. Yes, please.

A. "Item 1." That starts at the top of the page: "February 4, 1938. Basic steps of progress for B.C. Co."

Q. That is Burnham Chemical Company?

A. Burnham Chemical Company, yes. "1. Write or see E. C. Finney to find out who caused the P.O. fraud order renewal."

Q. And that referred to the fact that the Post Office had revived the enforcement of the fraud order, did it not? A. Yes.

Q. Go right ahead.

A. "Item 2: Have Robert Collier of New York write up a series of extant letters for getting contributions for fight for justice and to be mailed to all B.C. Co. stockholders

"Item 3: Hunt for a noted writer who is opposed to trusts to write up a story of B. C. Co."

(Testimony of George B. Burnham.)

Q. That is Burnham Chemical Company?

A. Yes.

Q. That is, "for a noted writer who was opposed to trusts to write up a story on Burnham Chemical Company"? [308]

A. Yes.

Q. Go right head.

A. "Item 4: Employ William Stephens to investigate to see if we have a case against the P.C.B."

Q. Who had suggested the name of William Stephens to you as an attorney?

A. A stockholder in New York.

Q. And some stockholder in New York before February 4, 1938, had suggested you employ Mr. Stephens in connection with a possible suit against these defendants American Potash & Chemical Company and Pacific Coast Borax, is that correct?

A. That's right.

Q. What was the purpose of hiring a writer opposed to trusts to write a history of the Burnham Chemical Company?

A. Well, I thought it might do some good for us, but I abandoned the idea.

Q. But when you wrote these meditations you thought if somebody opposed to trusts would write a story on the Burnham Chemical Company, that would be helpful?

A. Yes.

Q. Now, then, you did consult Mr. Stephens in New York on May 10, 1938, did you not?

A. May 10, 1938, yes.

Q. That is correct?

A. Yes. [309]

(Testimony of George B. Burnham.)

Q. By the way, have you an entry on May 4, 1938, with respect to a call on Senator Pittman?

Mr. Carr: What date?

Mr. Harrison: May 4, 1938.

The Witness: Yes, I believe I have.

Q. May I see it, please?

A. I believe I have. I will look and see. Yes, there is a copy here.

Q. And on that date you called on Senator Pittman? A. Yes.

Q. Which part of the page, please?

A. Right down there (indicating).

Q. Will you read that entry, please — the two lines, I suppose, are all that refer to it.

A. It says, "Saw Pittman.". That was Senator Pittman. "On May 4, 1938. Committee done nothing yet. Expect to hold a meeting this summer and may call upon me. Will report to Congress at the next session." That is all.

Q. Now, the committee you were discussing with Senator Pittman on May 4, 1938, was the committee, I assume, about which you were written in 1936 in the correspondence introduced in evidence this morning? A. Yes.

Q. That is to say, the committee which was appointed to investigate the potash situation? [310]

A. Yes, both the potash and borax.

Q. And borax, too? A. Yes.

Q. And then six days later, on May 10, 1938, you consulted Mr. Stephens in New York?

A. That's right.

(Testimony of George B. Burnham.)

Q. He is an attorney at law? A. Yes.

Q. You unburdened your troubles to him, is that right? A. Yes.

Q. And among those troubles were the price cuts of 1928? A. Yes.

Q. Will you read me the diary entry with respect to your consultation with Mr. William Stephens?

A. At the top of the page it is dated May 10, 1938, and reads, "Result of conference with William Stephens attorney: newspaper articles—magazine articles—agitation against P. C. B.".

Q. That means Pacific Coast Borax, does it not?

A. Yes, "or A. P. & C. Co."

Q. That means American Potash & Chemical Company, does it not? A. Yes.

Q. Go right ahead.

A. "Or Department of Interior does not render any direct benefit to B. C. Co. stockholders."

Q. Burnham Chemical Company stockholders?

A. Yes, Burnham Chemical Company stockholders, that's right.

"It is too much on the order of revenge unless Potash Investigating Committee can be influenced to pass favorable legislation."

Q. Did that represent advice that Mr. Stephens gave you on that occasion? A. Yes.

Q. All right, now, go ahead.

A. "Doubt that we have a chance with the Federal Trade Commission as price cut period is now outlawed."

(Testimony of George B. Burnham.)

Q. Does that represent advice he gave you on that occasion? In other words, he told you he doubted you had a chance with the Federal Trade Commission as the price cut period was now outlawed? A. Yes, that is what he meant.

Q. And by the price cut period he meant the period in June, 1928? A. Yes.

Q. In June, 1928, when you began your production, isn't that true? A. That's right.

Q. All right, now, will you go ahead?

A. "Statute of limitations for six years—price cut started in 1928. However, if evidence of collusion between P. C. B.—"

Q. That is Pacific Coast Borax?

A. Yes, "and A. P. & C. Co. is found, then that new evidence would be grounds for starting an anti-trust suit to recover damages for B. C. Co. Must find new evidence. Best bet is to concentrate on patent infringement by finding new evidence of infringement of process by A. P. & C. Co."

Q. That "A. P. & C. Co." in both cases means, of course, American Potash & Chemical Company?

A. Yes, American Potash & Chemical Company.

Q. At the time you consulted Mr. Stephens in May of 1938 you were again becoming suspicious with respect to the fact that these companies had cut their prices in June, 1928, in the very month you had started production, were you not?

A. Yes.

Q. That is to say, you were suspicious they had

(Testimony of George B. Burnham.)

done it for the purpose of injuring you, isn't that true? A. Yes.

Q. Now, you told Mr. Stephens the general history of the Burnham Chemical Company and you told him that the price cut had occurred in June, 1928, at the very time you started production, did you not? A. Yes.

Q. And didn't he say, "That is a remarkable coincidence that [313] the price should have dropped the very month you started producing and it might indicate some violation of the law"?

A. Yes.

Q. Did he say that even if it did indicate a violation of the law more than six years had gone by and he thought probably the statute of limitations would prevent you from doing anything?

A. Yes.

Q. Did you call his attention to the fact that the price cut occurred by the two companies simultaneously and during the very month when you first started production, or about the same time?

A. During the month, but I don't know that I used the word "simultaneously".

Q. But you said at about the same time?

A. Yes, I said at about the same time.

Q. And in the month you started production?

A. Yes, during the month.

Q. And he was quite impressed with that point, was he not? A. Yes.

Q. Then you returned to San Francisco, did

(Testimony of George B. Burnham.)

you, after that interview with Mr. Stephens—return west, let us say?

A. Let me see, 1938? Well, I got back to San Francisco. I suppose I did. I would have to check up my notebooks to know for sure. [314]

Q. Now, you started—excuse me, did I interrupt you?

A. I think I went on right back to San Francisco, yes.

Q. You started back east in August of 1939, did you not? A. Yes.

Q. And when you started back east in August of 1939, you brought with you a copy of the Mather letter to which we have referred, did you not?

A. Yes.

Q. And you brought with you a copy of Mr. Townsend's letter to Mr. Hinrichs in July of 1928, did you not?

A. Yes, I think I had that too with me.

Q. And you brought with you this draft of an account of monopoly which Mr. Muir prepared?

A. I evidently had that with me.

Q. So you must have brought that with you in August of 1939? A. Yes.

Q. How long have you had that paper by Mr. Muir?

A. I think Muir wrote that in about May of 1938 and had not finished it. It was not complete.

Q. It was a preliminary draft? A. Yes.

Q. He had given it to you about May of 1938?

A. Somewhere around there.

(Testimony of George B. Burnham.)

Q. And you had had it from that time until you started east in August of 1939? [315]

A. That's right.

Q. Mr. Muir was a stockholder of your company, was he not? A. Yes, yes.

Q. Now, when you went east in August of 1939, you expected to confer with Mr. Stephens, did you not, the attorney with whom you had consulted during the previous year in New York?

A. Yes, I think I was going to see Mr. Stephens again.

Q. And while you were east on that trip you called on Mr. Berge of the Antitrust Division of the Department of Justice, did you not?

A. This was the trip in the fall of 1939?

Q. 1939? A. Yes.

Q. In November, 1939, you called on Mr. Wendell Berge? A. Yes.

Q. And Mr. Wendell Berge was one of the members of the Department of Justice, in the Antitrust Division, was he not? A. Yes.

Q. And Mr. Berge suggested that you write a letter to his superior, Mr. Thurman Arnold, did he not? A. Yes.

Q. And Mr. Thurman Arnold was Assistant Attorney-General in charge of the Antitrust prosecutions at that time, was he not?

A. Yes.

Q. While you were east on that occasion you wrote a letter to the Secretary of the Interior, did

(Testimony of George B. Burnham.)

you not, on November 18, 1939, which has been introduced in evidence here? A. Yes.

Mr. Carr: What number is that? -

Mr. Harrison: No. 14.

You can follow me, Mr. Burnham, with that copy. I have read parts of this letter to the Jury already, the parts particularly relating to Mr. Mather and his letter. I now read other parts of the letter. This is a letter of November 18, 1933, to the Secretary of the Interior, Washington, D. C. The second paragraph on the first page states:

“As President and Stockholder of the Burnham Chemical Company and as a citizen of the United States I protest the granting of any further potash lands, through lease or otherwise, to the American Potash & Chemical Company; and I make this protest on behalf of seven thousand American citizens who are stockholders of the Burnham Chemical Company. The reasons for my protest are as follows:

“(1). The American Potash & Chemical Corporation and other fertilizer producers are now being investigated by the Antitrust Division of the Department of Justice for alleged violation of the Sherman Antitrust Laws. This corporation is a foreign-owned Company with about [317] 80 per cent of its stock held by foreign citizens residing in England. The corporation, together with another British-owned

(Testimony of George B. Burnham.)

potash and borax producer in the United States constitute a formidable monopoly of the potash and borax industry of this country.”

Q. Now, the other British-owned potash and borax producer was the Pacific Coast Borax Company and allied companies, was it not?

A. Yes, sir.

Q. On Page 3, Paragraph 3, it is stated:

“The Burnham Chemical Company was granted a lease on lands at Searles Lake. The company is composed of 7,000 American citizens. It proceeded with the development of its lease by raising money through the mails. The literature it sent through the mail was based on facts, and was truthful, and yet the Post Office issued a fraud order against the Company, in 1925, denying it the use of the mails. Our supply of funds, the lifeblood of the Company, was cut off. The Company defended itself in the U. S. District Court, in Carson City, Nevada, and asked for a temporary injunction against the Post Office fraud order. The Court handed down a decision in favor of the Burnham Chemical Company, as it saw no evidence of fraud. It granted the Burnham Chemical Company a temporary injunction. This Post Office fraud order, of course, [318] made it extremely difficult for the Burnham Chemical Company to raise any funds thereafter. However, the Company did manage to

(Testimony of George B. Burnham.)

raise sufficient money to build part of its plant and produce borax; and 1,400 tons of 99½ per cent pure borax was produced. But, the very month our production started, in June, 1928, the American Potash & Chemical Corporation and the Pacific Coast Borax Company, both foreign-owned companies, began cutting the price of borax from approximately \$60 per ton f.o.b. Searles Lake to about \$18 a ton. Our cost of production was \$26 per ton, so, when the price fell below \$26 we were losing money—and we had to close down our plant. After we stopped our small production the price went up. This further discouragement of the efforts of American citizens to develop the country's natural resources was such that we were unable to pay even the rent on the lease, and, therefore, the Department of the Interior cancelled our potash lease."

Now, the next paragraph:

"It is a very significant fact that we produced 1,400 tons of 99½% pure borax by solar evaporation methods, and without the use of any fuel oil whatsoever. It is even more significant when it is realized that this was a small capacity plant which made this production and that only one product was made instead of several products. [319] If capital had been available so that other products could have been made at the same time, the

(Testimony of George B. Burnham.)

cost per ton of borax would have been much less because part of the cost of production would have been distributed over the various chemicals that were produced. Yet, if the Company had not been denied the use of the mails, ample capital would have been available. It is evident that the foreign-owned borax interests realized that if the solar methods of production got an adequate start they could become serious competitors to themselves; it would break the British Monopoly of the potash and borax industry in this country; and so this drastic cut in the price of borax was aimed at us, to drive the cheaper methods of production from the field. The new source of borax in the Kramer Borax fields was the excuse of the Borax Trust for cutting the price of borax, but that field had been in production for a year before we started production. Furthermore, after we stopped our small production, the price went up. Our being driven from the field of production was a detriment to the country as a whole, as well as to the 7,000 American citizens which our company is composed of, who were developing these valuable resources. Foreign interests drove us out."

Q. Now, you knew, of course, that the Kramer Borax fields had been in production the year before you started production at [320] the time in

(Testimony of George B. Burnham.)

1928, when you did start production—if my question is clear, isn't that right, Mr. Burnham?

A. Yes.

Q. I have already read the next passage in which I am interested with regard to Stephen T. Mather and I will not repeat that.

On Page 7:

“At the time the Carlsbad Potash Leases were issued in New Mexico, I understand foreign interests secured control of six of the seven leases—although it was against the public interest to permit foreign interests to control so much of the Government New Mexico Potash Reserve. I believe there was some protest about it at the time. However, a new company was formed to develop the leases, called the United States Potash Co., and this company is a subsidiary of the Pacific Coast Borax Co. and therefore is still a foreign-controlled company. Soon after the leases were granted and the new company was formed, Mr. Horace M. Albright, Director of the National Parks Service in the Department of the Interior, was made Vice-President and General Manager of the United States Potash Company. Mr. Albright resigned from his position in the Department of the Interior on August 10, 1933, and immediately became Vice-President and General Manager of the United States Potash Company—a foreign-

(Testimony of George B. Burnham.)

owned [321] company. (See Who's Who in America, 1938).

This incident shows a further connection between foreign-owned interests and Government officials which lead us to believe the foreign-owned interests have more than once used their influence in the Halls of Government to drive out American competition and that they have obtained more and more of the borax and potash of this country, to the detriment of American citizens."

I think that is all I care to call the Jury's attention to at this time in that letter.

Now, with respect to the letter of Mr. Arnold of November 22, 1939—that was Defendants' Exhibit A, Mr. Burnham. That letter I have already read to the Jury and I won't take the time to re-read it now except for purposes of refreshing your recollection. You said a few moments ago, Mr. Burnham, that you wrote this letter to Mr. Thurman W. Arnold dated November 22, 1939, at the suggestion of Mr. Berge? A. Yes.

Q. And the letter is addressed to Mr. Arnold, Attention Mr. Berge? A. Yes.

Q. It is a fact, is it not, that that letter states substantially what you had told Mr. Berge in the interviews you had with him a few days before?

A. Yes. [322]

Q. Substantially? A. Yes.

Q. And those things you told Mr. Berge in

(Testimony of George B. Burnham.)

that November, 1939, interview, you had told Senator Pittman in 1937 or 1938, had you not?

A. No—wait a minute, now. Things had been developed in 1939 and I told Pittman a great many of the things that I told Wendell Berge, but I told Wendell Berge more, because much more time went by.

Q. Then, I will ask you to turn to Page 469 of your deposition, please:

“Q. Had you ever told anybody else before your talk with Mr. Berge the things you told him?”

A. I talked to Senator Key Pittman on some of these things——”

Mr. Carr: What page?

Mr. Harrison: Page 469, Lines 3 and following:

“Q. Had you ever told anybody else before your talk with Mr. Berge the things you told him?”

A. Well, I talked with Senator Key Pittman on some of these things because the Senate had passed a resolution to make an investigation as to the activities of our competitors and Senator Pittman asked me for what information I had on the subject.

Q. When was that conversation with Senator Pittman? [323]

A. It seems to me it was in 1936.

Q. I see.

(Testimony of George B. Burnham.)

A. And also in 1937. Well, I had several conversations with Senator Pittsman."

Then, down on Line 23:

"Q. So you told Senator Pittman about that time the same things you had told Mr. Berge?

A. Yes, at that time, or a little earlier.

Q. That is to say——

A. A little earlier, I believe.

Q. That was about 1936 or 1937?

A. 1937."

Did you so testify, Mr. Burnham?

A. Yes, keeping in mind the other intervals that I couldn't tell Pittman. The things that happened in 1939 when I was talking to Pittman in 1937 and '38, naturally I couldn't tell him those things.

Q. I call your attention to the fact that you have already stated that your letter to Mr. Arnold contains a statement of what you told Mr. Berge. That is correct, is it not?

A. Say that again.

Q. The letter of Mr. Arnold, of November 22, 1939, is a statement of substantially what you told Mr. Berge a few days before? A. Yes.

Q. What you told Mr. Berge a few days before was what you had already told Senator Pittman, except as to things that occurred after you talked with Senator Pittman in 1937, or thereabouts, isn't that true? A. Substantially, yes.

(Testimony of George B. Burnham.)

Mr. Harrison: In order that the witness——

The Witness: I don't remember exactly the things, but substantially.

Mr. Harrison: In order that the witness' testimony may be clear, I would like to read certain passages from this letter.

Mr. Carr: What letter are you talking about?

Mr. Harrison: Defendants' Exhibit A to Arnold.

“Referring to a conversation which I had with Mr. Berge the other day, I understand that the Antitrust Division of the Department of Justice is investigating the alleged violation of the Sherman Antitrust Laws by the fertilizer industries.”

Q. That, of course, occurred in 1939?

A. I didn't know about it until November.

Mr. Harrison: “Potash is one of the principal fertilizer ingredients used by agriculturists and much of the potash produced in this country comes from Searles Lake, in California.”

Q. That, of course, had been true always, had it not? [325]

A. Yes.

Mr. Harrison: “The value of the borax and other boron chemicals produced from Searles Lake is about equal to the value of the potash. Both chemicals are recovered from the brine during its process of treatment. Therefore, the selling price of potash is dependent somewhat on the selling price of borax. The American Potash & Chemical Com-

(Testimony of George B. Burnham.)

pany is producing all the potash now made at Searles Lake, California. The only other source of potash in the United States besides Searles Lake is the Carlsbad Potash field in New Mexico. The principal producer there is the United States Potash Company, and it is controlled by the Pacific Coast Borax Company, who produce borax at Kramer, California. Therefore, this borax producer also has an influence over the price of potash."

Q. That you had known for sometime, of course, that condition? A. Yes.

Mr. Harrison: "The American Potash & Chemical Corporation and the Pacific Coast Borax Company are both English-owned companies, and the two together constitute the British Borax Trust. Hence the price of potash in America is practically under the control of the British Borax Trust.

"The Burnham Chemical Company at one time had a Government lease at Searles Lake, and was planning to make potash, borax and other chemicals from that deposit. [326] We completed a plant in 1928 for the production of borax, and we expected, through the profits we made in borax, to add a potash plant and also make other chemicals and gradually grow to become a large producer. Borax was selling for over \$60 a ton f.o.b. Searles Lake, and the Burnham Chemical Company estimated it could produce borax for \$25 a ton in a small plant with its patented solar^s processes; and so make sufficient profit to enable it to grow and make potash and other chemicals.

(Testimony of George B. Burnham.)

Q. And the preliminary draft of the article en-

“However, the very month the Burnham Chemical Company started production of borax, in June, 1928, a drastic cut in the price of borax occurred, with the result that, in a few months, we were forced out of business. From outward appearances it appeared that the price war on borax was between the two big English producers, namely, the American Potash & Chemical Corporation and the Pacific Coast Borax Company. The fact that the main price cutting in the price war started the month we began production convinces us that it was aimed purposely to destroy us. At least, that was the resulting effect of the price war.

“We took the matter up with our attorneys, Francis J. Heney and B. D. Townsend, to see if we did not have a case against the Trust for violating the Sherman Antitrust Laws. These attorneys, who are now both deceased, felt that we had a case, but we were so completely ruined [327] as a result of the price war, and also in debt, that we were financially unable to employ the attorneys to go ahead with the matter.

“As time goes on, more evidence has been gathered to show that the two British-owned borax and potash producers in the country are building up a monopoly to drive out all American competition. And so, since you are making an investigation of the fertilizer industries, I am bringing our situation to your attention at this time.

“Enclosed you will find a copy of a letter writ-

(Testimony of George B. Burnham.)

tern by Mr. B. D. Townsend to H. S. Hinrichs, dated July 26, 1928, in which Mr. Townsend points out certain features of the unfair methods of competition being used by the British Borax Trust.

“There is also enclosed the preliminary draft of an article entitled, ‘Foreign-owned monopoly vs. People of the United States.’ It is really a history of the Burnham Chemical Company. This article is not completed and should be treated confidentially until such time as the author desires to put it in finished form.

“I am also enclosing a letter dated November 18, 1939, which I have just written to the Secretary of the Interior, asking that we be granted a new lease on Searles Lake, and suggesting Government financial aid to develop the lease. There may be something in all the enclosed data [328] which will be helpful to you.

“If there is anything further that I can do to assist you in your investigation, I shall be very happy to do so.

Yours very truly,

G. D. BURNHAM.”

Q. (By Mr. Harrison): Now, the letter to Hinrichs, which was mentioned in this letter, and a copy of which you sent to Mr. Arnold on that day, has been introduced in evidence in this case, has it not? That is the letter that was enclosed in the letter to Mr. Arnold? A. Yes, I believe it is.

Q. And the preliminary draft of the article and entitled, “Foreign-owned Monopoly vs. The People

(Testimony of George B. Burnham.)

of the United States," which you sent to Mr. Arnold with this letter, was the article by Mr. Muir which we have been discussing earlier this afternoon? A. Yes.

Q. You have a copy of that here in court, have you not, the Muir article? A. Yes.

Q. Now, then, after having written Mr. Arnold on November 22, 1939, you wrote Mr. Pierce on December 18, 1939, did you not?

A. In answer to his letter to me, yes.

Mr. Carr: What date is that?

Mr. Harrison: December 18, 1939.

The Witness: Do you have a copy there? [329]

Mr. Harrison: I am trying to find it, Mr. Burnham. Yes, I have it. I have a copy that I think you gave me. It may be in the deposition file here, a letter from Mr. Pierce dated December 8, 1939.

Q. Have you that?

A. Yes, I have the original.

Q. You have the original?

A. I just now found it.

Mr. Harrison: December 8, 1939, a letter from Mr. Pearce to Mr. Burnham. We offer this letter in evidence, if the Court please.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit W.)

(Testimony of George B. Burnham.)

“Department of Justice, Room 1904, U. S.
Court House, Foley Square, New York,
N. Y. File No. 60-44-13.

December 8, 1939.

“Mr. G. B. Burnham
214 E. C. Lyon Building
Reno, Nevada

Dear Sir:

Your letter of November 22, 1939, addressed to Honorable Thurman W. Arnold, Assistant Attorney General, attention Mr. Berge, with the enclosures, has been forwarded to me here for my attention.

The practices of potash companies come within the [330] general scope of the fertilizer investigation which the Department is conducting.

Please forward to me any documentary evidence which you may have in your possession sustaining the views expressed in the correspondence in our possession. We can arrange to have copies made and return the originals to you, if desired.

Also, if agreeable to you, I should like to have a representative call upon you at Reno, Nevada, so that you may be enabled to give him further detailed information regarding these matters.

Very truly yours,

CHARLES C. PEARCE,

Special Assistant to the
General.”

(Testimony of George B. Burnham.)

Q. And you have a copy of your reply?

A. This is the copy of the reply.

Mr. Harrison: I offer this copy of reply to the Department of Justice, Attention Mr. Pearce, dated December 18, 1939, from G. B. Burnham, as Defendants' Exhibit next in order.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit X.)

"Muskogee, Okla., Dec. 18, 1939.

"Department of Justice,
Room 1904
U. S. Court House,
Foley Square,
New York City, New York.

Attention: Charles C. Pearce.

"Gentlemen:

Your letter of Dec. 8, 1939, was forwarded to me at Muskogee, Oklahoma. I am traveling around and may not get back to my office for a few weeks yet, but I will be glad to confer with your representative there, or at my home at 2823 Kelsey St., Berkeley, Calif. I will arrive at my home in Berkeley, California, before I reach my office in Reno, and, if you wish, I can communicate with your San Francisco office upon my arrival.

I do not know just what documentary evidence you desire, but in case you want to know the prices

(Testimony of George B. Burnham.)

to which borax was cut in 1928 this information can be obtained from Mr. A. C. Hill, 6066 Rockridge Blvd., Oakland, Calif. He is the Secretary-Treasurer of the Burnham Chemical Co. and much of our files on the sale of our borax is in his possession. I am sending him copies of our correspondence.

In case you desire to see the letter of Oct. 8, 1926, from Mr. Stephen T. Mather to Mr. Whitney, that is in the possession of Mr. Whitney, whose office is at 433 California Street, San Francisco, Calif. Mr. Whitney was Vice-President of the Burnham Chemical Co. at the time the letter was written to him. I am writing him explaining your request.

Enclosed herein is a copy of our cost of producing borax for the month of October, 1928. Further information on this cost can also be obtained from Mr. C. G. Hill. [332]

It should be remembered that this operating cost of \$26.67 a ton for borax was for a very small capacity plant producing just the one product—borax—from the brine. If we had had a large capacity borax plant and also if we had been recovering potash and other chemicals from the brine at the same time, our cost of production would have been a great deal less. However, even at an operating cost of \$26.67 a ton we could have made a substantial profit if the price of borax had remained up. The very month we started production in June, 1928, the price war on borax started. Our borax

(Testimony of George B. Burnham.)

was 99½% pure and was made by the solar evaporation of the Searles Lake brine. We required no expensive fuel oil to evaporate the brine as do the American Potash & Chemical Co. But our process was patented and they did not want us to succeed; so they started the price war.

Enclosed herein you will note a copy of an article prepared by the American Economic Committee for Palestine in which they describe the cheap solar evaporation process of potash production from the Dead Sea, in Palestine, as follows:

“The Palestine method of production is as follows:

(1) the water of the Dead Sea is pumped into large, large shallow pans;

(2) the hot sun shining over the pans evaporates the [333] sea water leaving the potassium chloride and magnesium bromide and vast quantities of common salt; and

(3) the fresh water of the Jordan is used to dissolve the impurities in the raw potash produced in the pans and so refines the potash. While this method is simple and cheap, low cost of production is offset by the somewhat primitive transport facilities.”

If the solar evaporation process could have a fair chance to be developed at Searles Lake in California like it has at the Dead Sea in Palestine, I am convinced the process would make potash, borax and other chemicals far cheaper than the artificial

(Testimony of George B. Burnham.)

evaporation method now used by the Borax Trust at Searles Lake. Of course the process would be different as the brine of Searles Lake is different, but it should be cheap.

I believe the Government should help the Burnham Chemical Co. develop its solar process for producing potash and other chemicals from Searles Lake brine. In my opinion, that is the secret for cheap potash for the American farmer.

Should you desire any further information I will be glad to furnish it.

Yours sincerely,

G. B. BURNHAM."

Q. (By Mr. Harrison): Calling your attention to this letter [334] which I have just read, Mr. Burnham, isn't it a fact that apart from the reference to the operations in Palestine, you told Mr. Berge in your interview with him in November substantially what is stated in this letter of December 18, 1939, to Mr. Pearce?

A. Yes, although there are a few other things in that letter.

Q. Generally speaking, apart from that matter, you had told Mr. Berge what you told Mr. Pearce in that letter? A. Yes.

Q. Did you have further correspondence with the Department of Justice in that month, or the following month?

A. The letter to Mr. Clark, Morris Clark.

Q. January 30, 1940?

A. Yes, about that time.

(Testimony of George B. Burnham.)

Q. Have you a letter of January 5, 1940, to Mr. Pearce?

Mr. Carr: That is the one you are going to take up now?

Mr. Harrison: Yes, that is in chronological order, January 5, 1940.

The Witness: Yes, I have it.

Mr. Harrison: We offer in evidence this letter of January 5, 1940, to the Department of Justice, signed by the witness.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit Y.)

Mr. Harrison: "January 5, 1940.
"Department of Justice
Room 1904 U. S. Court House
Foley Square, New York, N. Y.

Attention: Charles C. Pearce.

"Gentlemen:

Referring to your letter of December 8th, 1939, in regard to having a representative of your Department call upon me in order to get further information on the practices of potash producers, I will be at my office in Reno for the next several days.

I arrived at my home in Berkeley, California, on January 2nd, but was there only a short time and then came on up here to Reno, Nevada. It looks like I will be in Reno for about one week

(Testimony of George B. Burnham.)

and then I may return to Berkeley, California, for another week. After that I may go east again, although that is not certain. My address in Berkeley is: 2823 Kelsey Street.

The price cutting on borax, mentioned in my December 18, 1939, letter to you occurred in June, 1928. The price cutting drove the Burnham Chemical Co. out of business and prevented us from building up a plant to produce potash, borax and other chemicals at Searles Lake, California. In the June, 1928, issue of Chemical and Metallurgical Engineering magazine (Vol. 35, page 390) the following quotations are given on borax in barrels in the New York market. June, 1928, prices were $2\frac{1}{2}c$ to $3c$ per pound. The month previous was $4c$ to $4\frac{1}{2}c$ per pound and the year previous was $4\frac{1}{4}c$ to $4\frac{1}{2}c$ per pound. The price of $4c$ per pound is \$80.00 per ton and $2\frac{1}{2}c$ per [336] pound corresponds to \$50.00 per ton.

The freight cost to ship borax from Searles Lake, California, to New York was about \$20.00 per ton, hence the price of borax f.o.b. plant was reduced from \$60.00 per ton to \$30.00 per ton. In other words, the price of borax was cut in half at the plant the very month we started production. About three months later it was down to about \$18.00 per ton f.o.b. plant.

On page 389 of the June, 1928, issue of Chemical and Metallurgical Engineering Magazine, the following statement is made:

(Testimony of George B. Burnham.)

‘Among important price changes in market for chemicals during the past month was a drastic decline in quotations for borax and boric acid. Improved processes by which production costs have been lowered is given as the reason underlying the price change.’

The statement that improved processes caused the price reduction does not entirely fit into the facts. The newly discovered borax deposits in the Kramer Borax District, California, in 1925 no doubt has had some influence on the price of borax, but the Kramer field was producing borax for about a year and a half before we started production. The processes at Kramer and Searles Lake were fairly well established. Yet the very month [337] we started production they cut the price in half. If the processes were being improved you would expect a more gradual lowering of price. I will be glad to go into this in more detail with your representative when he calls.

Since my stay in Reno and Berkeley will be short, I have decided to wire you as per enclosed copy.

Yours truly,

G. B. BURNHAM.”

Q. (By Mr. Harrison): And then after that you wrote Mr. Clark, did you not, Mr. Burnham?

A. Yes.

Q. Have you a copy of that letter?

A. Yes, January 30, 1940.

(Testimony of George B. Burnham.)

Q. Yes, January 30, 1940. I offer this letter. in evidence as Defendants' next in order.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit Z.)

Mr. Harrison: "January 30, 1940

"Mr. Morris Clark

U. S. Department of Justice

Room 422, Post Office Building

7th and Market Streets

San Francisco, California

New York File No. 60-44-13

Dear Sir:

Referring to our conversation a few days ago I have been checking up on the prevailing price of borax and I find that borax in bags is quoted in the 'Chemical and Metallurgical Engineering' magazine for January, 1940, at [338] \$48.00 to \$51.00 per ton f.o.b. New York. This price is for carload quantities. The price range varies with the kind of borax, that is, powdered, granulated, or crystal borax. Freight from Trona (Searles Lake), California, to New York by rail (80,000 lbs. minimum carload) is \$17.60 per ton making the price \$30.40 to \$33.40 per ton f.o.b. Trona, California, today.

As mentioned in my letter of January 5, 1940, to Mr. Charles C. Pearce of your New York office, the price of borax dropped from about \$60.00 per ton f.o.b. Searles Lake to about \$30.00 per ton in June, 1928. The enclosed photostat copies of pages

(Testimony of George B. Burnham.)

in the 'Chemical and Metallurgical Engineering' magazine for June, 1928, show a drastic cut in price for borax for that month compared to the previous month. On page 389 of this same June issue there is statement about this 'drastic decline in quotations for borax. . . .' That was the very month we started our borax production, June, 1928. We continued our production until January, 1929, and we were then forced to shut down due to price cutting. From stocks of borax on hand we continued to sell borax until the fall of 1929. During this period the price of borax continued to fall still more. Attached are copies of letters showing that we received as low as \$17.64 per ton net f.o.b. plant in August, 1929, for some of our borax shipped to Europe on [339] consignment and sold in competitive markets in competition with the Borax Trust.

The photostat copy of the telegram enclosed also shows our competitor was quoting \$40.00 a ton for borax delivered in Ohio, U. S. A., in April, 1929. We had to meet this price and you will note we sold some borax in the summer of 1929 to Proctor & Gamble Company in Ohio through the Globe Chemical Company at \$40.00 per ton delivered. After deducting freight and 5% brokerage that borax net us only \$19.27 f.o.b. plant.

By the fall of 1929 all the borax stored in our warehouse was sold. We were shut down and without funds to renew operation because we had been forced to sell borax below cost of production.

(Testimony of George B. Burnham.)

So in November, 1929, since we had been forced out of business, the market price of borax went up to \$.03 per pound or \$60.00 per ton f.o.b. New York as shown on the page 710 of the 'Chemical and Metallurgical Engineering' magazine for November, 1929. On page 709 of the November, 1929, issue a statement is made that the prices of 'Borax and boric acid are higher.' \$60.00 a ton f.o.b. New York would correspond to about \$40.00 a ton f.o.b. Searles Lake. Yet just a few months before that we got less than \$20.00 a ton for our borax f.o.b. Searles Lake.

As long as we threatened renewal of our [340] production or had stocks of borax on hand, the price stayed down, but when all our borax was sold and we were eliminated as a competitor the price went up. We were a potential producer of potash and therefore when we were eliminated as a borax producer we were also eliminated as a future potash producer.

Another interesting point to consider is that this price increase took place in November, 1929. Yet about two months prior to that time the financial crash of 1929 had started. The world-wide depression had begun with stumbling stock market prices. In spite of the fact that one of the biggest depressions in history was upon the world, the Trust raised the price of its borax. That is further evidence that the rise in price was because we were eliminatd as a competitor.

However the long duration of the depression and

(Testimony of George B. Burnham.)

the cheaper source of borax in the new **Kramer Borax Field** has kept the price down, so it has never as yet returned to its former price level that existed prior to June, 1928.

Trusting this information will be helpful to you, I remain,

Yours sincerely,

G. B. Burnham,

President of the Burnham
Chemical Company."

Q. (By Mr. Harrison): Now, calling your attention to the statement of facts contained in that letter with respect to the price fall in June and with respect to the rise in November, 1929, [341] you knew of that price fall and that price rise when they respectively occurred, did you not?

A. Yes.

Q. And, of course, you knew that the price rise occurred in November, 1929, after you had sold all of the borax on hand? A. Yes.

Q. You had discontinued producing borax by the end of 1928 or the beginning of 1929, isn't that true? A. Discontinued production, yes.

Q. And you had still some borax on hand?

A. Yes.

Q. All of that borax was sold before the price began to rise in the manner described in this letter?

A. Yes.

The Court: We will take the afternoon recess now, ladies and gentlemen. Please bear in mind the admonition of the court.

(Recess.)

(Testimony of George B. Burnham.)

Q. Mr. Burnham, going back to the matter of the Post Office Fraud, you filed suit to enjoin the enforcement of that order in the summer or fall of 1925, did you not?

A. In September, 1925.

Q. Yes. I call your attention to this letter to your stockholders dated December 3, 1925, which is printed. Was that sent to your stockholders on its date? A. Yes.

Mr. Carr: December what?

Mr. Harrison: December 3, 1925.

The Witness: Yes.

Q. And you signed it, did you not, or your facsimile signature was attached?

A. Well, I am not sure of the date it was mailed.

Q. About that time—on that date or shortly thereafter? A. Yes.

Mr. Harrison: I offer this as our next exhibit.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit AA.)

Mr. Harrison: I will read only three sentences from this:

“The officials of this Company have no apologies to make for the rigorous character of its defense against an unwarranted action by the Post Office which we contend was inspired by large competitors who are naturally alarmed that the new Burnham plant will become a formidable factor [343] in the borax field.

(Testimony of George B. Burnham.)

“We bow to the unmistakable compliment thus paid us by these interests. In all probability they have good and sufficient reasons for regarding us as competition to be reckoned with. By virtue of the Burnham Chemical Company’s new and improved processes, and its many millions of tons of raw materials we propose to give our competitors a fair fight for supremacy in the field. But our fight will be in the open and only by the fair methods known to reputable American institutions.”

That is the “pat-on-the-back” letter. I call your attention to this document or paper that is called “Lake of Treasure” and is dated February, 1926.

Mr. Carr: That is the “pat-on-the-back” letter?

Mr. Harrison: Yes, that is the “pat-on-the-back” letter. I call your attention to this document or paper that is dated February, 1926, and is entitled “Stockholders Confidential Edition,” and I will ask you if you distributed that newspaper to your stockholders at or about its date?

A. Yes.

Mr. Harrison: We offer this in evidence, if the Court please, as Defendants’ Exhibit next in order.

Mr. Carr: What is the date of that again?

Mr. Harrison: The date of that is February, 1926.

(The document dated February 26, 1926, was received in evidence and marked Defendants’ Exhibit AB.) [344]

(Testimony of George B. Burnham.)

Mr. Harrison: And I read from it the following statement:

Mr. Carr: Excuse me, Mr. Harrison, is that Defendants' Exhibit BB, Mr. Elkington?

The Clerk: Defendants' Exhibit AB.

Mr. Harrison: (Reading):

"Like a bolt from the blue comes the sudden action by the Post Office against this enterprise. Apparently at the instigation of certain foreign-controlled competitive chemical interests evidently seeking to be the only ones to recover these great rich deposits of borax and other minerals and who apparently had long been working in the dark to accomplish their ends, the United States Post Office suddenly issued an order which temporarily prevented the Burnham Chemical Company from receiving mail."

Q. The foreign-controlled competitive chemical interests referred to there are American Potash & Chemical Company and Pacific Coast Borax Company, are they not? A. Yes.

Q. Now, I call your attention to this Progress Report to Burnham stockholders with a note up in the righthand corner, "October, 1927," and I will ask you whether that was distributed to your stockholders in print about October, 1927?

A. Yes, I believe it was accompanying a letter that was dated at about that date. [345]

Q. Yes, I believe I have that letter. This is the

(Testimony of George B. Burnham.)

letter that accompanied that document, is it not?

A. I believe that's right. This document, this Progress Report accompanied this letter.

Mr. Harrison: Yes. I offer this Progress Report as the defendants' exhibit next in order and ask that the letter be marked for identification.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit AC, and the letter accompany Exhibit AC, was marked for Identification as Defendants' Exhibit AD.)

Mr. Carr: For identification?

Mr. Harrison: Yes, I don't care to offer it. You may, if you wish, Mr. Carr.

The Court: The Progress Report is AC.

Mr. Carr: You cannot read it, if it is only for identification.

Mr. Harrison: I am not reading the one I asked be marked for identification. The witness mentioned a letter that went with this.

Mr. Carr: You are reading from AB?

Mr. Harrison: No, from AC.

The Court: The letter will be marked Defendants' Exhibit AD For Identification.

Q. (By Mr. Harrison): You are familiar with this Progress [346] Report when it went to the stockholders? A. Yes.

Q. And you are familiar with the photograph which appears in the upper lefthand corner of the third page and which is entitled, "The Plant of the

(Testimony of George B. Burnham.)

American Potash & Chemical Company Who Doubled Their Production Several Months Ago”?

A. Yes.

Q. And that is a photograph of the plant of the American Potash & Chemical Company where that production had been doubled several months before October of 1927? A. Yes.

Mr. Harrison: We ask that this be passed to the jury so they can see it, if your Honor please.

The Court: Do you want to do it at this time?

Mr. Harrison: No, it can be done at the close of the session, or in the argument, perhaps.

The Court: Yes.

Mr. Carr: May I look at that?

Mr. Harrison: Yes, surely.

Mr. Carr: Thank you.

Q. (By Mr. Harrison): In June, 1928, when you started production, the process of the Pacific Coast Borax in Kramer field as well as the process of the American Potash & Chemical Company at Searles Lake had been well established, had they not, for some time? [347]

A. At what time do you refer?

Q. In June, 1928, when you started production and when the price cuts occurred?

A. Yes, the production from Kramer had been started a year and a half before, and of course at Searles Lake several years before.

Q. Yes. When you started east in August of 1939 and brought with you the copy of the Mather letter and the amended complaint in the Post Office

(Testimony of George B. Burnham.)

fraud suit and the Muir report, you did so, did you not, because you considered those letters to be important? A. Yes, sir.

Q. After the Zabriskie conversation on May 17, 1929, which you have described in your direct testimony, did you make any report to your stockholders, either orally or in writing, of what Mr. Zabriskie had told you?

A. I reported to the stockholders that the reduced price of borax was due to——

The Court: No, the question was, did you make any report to the stockholders as to what Mr. Zabriskie had said to you?

The Witness: A. No.

Q. (By Mr. Harrison): Did you make any report in writing to the members of the board of directors as to Mr. Zabriskie's statements to you?

A. No, not in writing. [348]

Q. Now, I call your attention, Mr. Burnham, to the language in your letter of November 18, 1939, to the Secretary of the Interior, in which you stated, "After we stopped our small production the price went up." The idea of the price going up after you had sold all your borax didn't first come into your head on November 18, 1939, did it? A. No.

Q. You realized long before 1939 that that fact might have a peculiar significance, did you not?

A. Yes, one significance would be that we were not selling any more borax and one less competitor would make the price go up.

(Testimony of George B. Burnham.)

Q. And they waited until you had sold your borax before they let the price go up?

A. It might have gone up automatically since we were out of selling.

Q. Well, the thought had occurred to you long before 1939, the fact that the price went up when you were out of business and sold your borax, might have a peculiar significance, would it not?

A. Yes, but there were two explanations of that.

Q. You attached importance to it long before 1939?

A. One reason was there was one less producer and that would make the price go up.

Q. As a matter of fact, the amount of borax you had in 1929 [349] was very, very small compared to the production of the American Potash & Chemical Company and Pacific Coast Borax Company, isn't that true?

A. Yes, but we were quoting prices to the consumer, and the consumer would naturally turn around to American Potash & Chemical Company and tell them, "I can get it less from Burnham Chemical Company," and that had an automatic effect of making prices go down.

Q. It wouldn't have an automatic effect if they were actually competing and offering lower prices, would it?

A. The laws of supply and demand—usually the more producers in the market the lower the prices.

Q. And yet it is a fact, is it not, that your pro-

(Testimony of George B. Burnham.)

duction in 1929 was infinitesimal compared to the production of these larger companies?

A. Well, yes——

Mr. Carr: What do you mean by “infinitesimal”?

Mr. Harrison: It was quite small compared to the others, is that right, Mr. Burnham?

A. Yes.

Q. They were the chief elements in the market, were they not?

A. But one producer making 1000 tons could offset the market tremendously.

Q. Were you trying to keep the price down in 1929?

A. Yes, but there are laws of supply and demand. [350]

Q. But didn't you attach importance long before 1939 to the fact that these two big competitors had cut the price the very month you started to produce, kept the price down for many months and as soon as you sold all your borax they raised the price again—both of them: Did you attach importance to that long before 1939?

A. There was importance to that, but after my talk with Zabriskie I believed Zazriskie on his theory of the law of supply and demand.

Q. You had had a good deal of experience in the borax market, had you not?

A. Yes, before we entered the market there were only five producers, and when we entered there were six.

(Testimony of George B. Burnham.)

Q. And the five remained?

A. And the five remained.

Q. And when you wrote Mr. Clark in January, 1940, you attached a great deal of importance to the fact that they had raised the price after your borax had been sold?

A. Yes, because new things had developed that made me suspicious that our competitors had conspired to control the price, but after my talk with Mr. Zabriskie my suspicions had been completely nullified.

Q. The thought occurred to you from time to time that, long before 1939 when your suspicion was aroused, that it was a peculiar circumstance that the price had gone down in June, [351] 1928, and stayed down until your small element was out of the market?

A. But there were two good explanations for it.

Q. I understand that, but I am asking you whether the thought occurred to you or not.

Mr. Carr: Let him answer the question.

The Court: Yes, but he always argues. Counsel can argue the effect of the answers.

Mr. Carr: I don't think it is an argument. It is an explanation. It is not an argument.

Q. (By Mr. Harrison): Now, then, have you a copy of the Burnham Crystals of 1929?

Mr. Carr: 1939?

Mr. Harrison: 1929.

Mr. Carr: Sometimes it is difficult to hear. I don't mean to annoy you by asking.

(Testimony of George B. Burnham.)

Mr. Harrison: No, don't hesitate.

Q. By the way, while you are looking for that, Mr. Burnham, do you mind telling us what the "Burnham Crystals" are or were?

A. "Burnham Crystals" was in the nature of a progress report to our stockholders telling the stockholders what was being accomplished at the plant; what production was being made, and it was in the nature of a progress report.

Q. It was a printed sheet you sent out to your stockholders [352] from time to time?

A. Yes.

Q. And you called them the "Burnham Crystals"? A. That's right.

Q. Do you have that paper now?

A. You asked for April, 1929?

Q. Yes? A. Yes, this is one.

Mr. Harrison: We offer this in evidence as Defendants' Exhibit next in order.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit AE.)

Mr. Harrison: May I read two passages from this number of "Burnham Crystals"? This is one of April, 1929:

"Just at the time we started producing the price was cut by our competitors to \$30 per ton at the plant, or \$50 delivered to any destination. The average freight rate is about \$20 per ton. We have sold some of our borax, but not

(Testimony of George B. Burnham.)

all. With every attempt of our agents to sell our borax our competitor cuts the price lower, with the result that today the price of borax is only \$19 per ton at the plant."

Again:

"Our competitor who is cutting the price is making nearly half of the world's borax. With such a huge [353] production as he is now making he is in a position to control prices on borax. His plant is just four miles from our plant. He makes his borax from Searles Lake brine. We are convinced he is using our patented processes to make his borax. Using our processes and cutting the price to drive us out of business. What could be more unjust."

Now, the term "our competitor", as used in that last paragraph refers to the American Potash & Chemical Company, does it not? A. Yes.

Q. Will you now produce the "Burnham Crystals" for March, 1930? I have a copy here. This is a true copy, isn't it?

A. I did not know I would be called upon for these.

Q. That is a copy? A. Yes.

Q. And it was distributed on or about its date, March 30, to all the stockholders? A. Yes.

Mr. Harrison: We offer this in evidence.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit AF.)

(Testimony of George B. Burnham.)

Mr. Harrison: That contains this statement, ladies and gentlemen of the jury:

“Our two main competitors in borax, one at Searles Lake, and the other at Kramer, California, make about ninety [354] per cent of the world’s borax. These two companies together completely control the borax price. However, they only make about five per cent of the world’s requirement for potash and hence they cannot control the price of potash.”

Q. Now, the two companies referred to in that statement, Mr. Burnham, were the American Potash & Chemical Company and the Pacific Coast Borax Company, is that not true? A. Yes.

Q. Have you, Mr. Burnham, a copy of your letter to the stockholders of January 13, 1940?

A. Yes, here is a copy.

Q. This is a copy, is it not? You produced that in the deposition? A. Yes.

Mr. Harrison: I offer this in evidence as Defendants’ Exhibit next in order, Mr. Clerk.

(The document in question was thereupon received in evidence and marked Defendants’ Exhibit AG.)

Mr. Harrison: This is a letter on the letterhead of George B. Burnham, Reno, Nevada, dated January 13, 1930.

The Witness: That is January 13, 1940.

Mr. Harrison: Excuse me, that is dated January 13, 1940, and reads as follows: [355]

(Testimony of George B. Burnham.)

“Dear Fellow Stockholder

“Last August I wrote you about the Burnham Chemical Co. I mentioned a hearing in Washington, D. C., on September 12, 1939, which I planned to attend. I attended the hearing and I am convinced that the Government is beginning to take our view regarding the disposition of certain valuable borax deposits in the Kramer Borax District, California.

For some time I have talked about the British owned potash and borax interests getting most of the potash and borax deposits in this country and driving out American competition. Well! Now the United States Department of Justice is investigating the potash producers of this country for their alleged violation of the Sherman Anti-Trust laws.

Q. Now, when you referred to the fact that for some time you had been talking about the British owned potash and borax interests getting the most of the borax and potash deposits in this country and driving out American competition, over what period of time did you refer?

A. I had in mind the whole period of the time when we were driven out of production.

Q. Since 1929? A. Yes.

Q. Reading on, Mr. Burnham: [356]

“British-owned interests are even trying to get the land at Searles Lake formerly held by

(Testimony of George B. Burnham.)

us. Enclosed is a copy of a letter to the Secretary of the Interior, dated November 18, 1939, protesting the granting of further lands at Searles Lake to foreign-owned interests and asking the Department of the Interior to return to us our lease and to assist us to get a Government loan to develop it.

“Just think—British-owned interests at Searles Lake have now produced about \$70,000,000.00 worth of chemicals from the lake brine and about 80% of the profits from this production are going to stockholders residing in England. As long as they are making profits the Burnham Chemical Co. could have made profits too, if it had had the capital. If the Post Office had not issued the Fraud Order against the Company in 1925, I believe the Burnham Chemical Co. today might have been as big a success as this foreign-owned company. You and the other stockholders of our Company would probably be getting much of the profits from the Searles Lake deposits instead of foreign stockholders getting practically all the profits. The mineral wealth of this country should go to Americans, not foreigners. In fact, the Government itself was a victim of that unjust fraud order because it has lost the royalty on production that our Company would have paid to it and also the Government has lost the income tax on dividends that [357] our

(Testimony of George B. Burnham.)

stockholders would have paid the Government had we got into production."

Q. Now, the fact is, is it not, Mr. Burnham, that your suit to enjoin the enforcement of the Post Office fraud order was delayed for a considerable time: it was first filed in September of 1925, was it not?

A. Yes.

Q. You filed an amended complaint in April of 1936. That complaint has been introduced in evidence, has it not?

A. 1926?

Q. 1926, excuse me.

A. Yes.

Q. There was no hearing on your application for a temporary injunction until January, 1930?

A. That's right.

Q. And the delay from 1926 to a few months before January of 1930 was due to the fact that the company lacked funds with which to prosecute the suit, is that not true?

A. There were several reasons.

Q. That was one of them, was it not?

A. What money that would come in was for the particular purpose of completing the borax plant.

Q. So that what money you had was money you could only use for completing the plant and you did not have in addition to that money sufficient funds to have your attorneys continue [358] with the prosecution of the suit?

A. That was one of the reasons.

Q. What other reason was there that you did not have sufficient funds that had to be devoted to building up your plant?

(Testimony of George B. Burnham.)

A. One of the reasons was that if we could build a plant and get into production that would solve all the accusations the Post Office made against us, because we would be producing and making money. That would have settled the Post Office fraud and would be better than a lot of affidavits and court trial.

Another reason for the delay of bringing that action was, I believe, the court calendar was crowded and Mr. Townsend was not any too well. There were several reasons, but I think the main reason in the final analysis is that the money should be devoted to construction in the plant and get that finished rather than to be spent in litigation.

Q. But at any event, after you devoted the money you thought was necessary to build the plant you did not have sufficient funds left with which to prosecute the suit more promptly. That is true enough, isn't it? A. Yes.

Q. Now, then, you had a claim which you believed to be good against American Potash & Chemical Company on account of this claim of patent infringement? A. Yes. [359]

Q. And you never brought suit against the American Potash & Chemical Company on that claim, did you?

A. We served notice of the infringement on them, but you never brought suit? A. No.

Q. And yet all the while you thought you had a good claim against them? A. Yes.

(Testimony of George B. Burnham.)

Q. And you failed to bring suit against them because of lack of funds, did you not?

A. Yes.

Q. I have already called attention to your statement in your letter to Mr. Arnold with respect to lack of funds to prosecute the claim herein involved. Now, several people have been mentioned in the course of your testimony here and I want to ask you whether these people are dead or alive. First, Mr. Zabriskie is dead?

A. Yes.

Q. Mr. Mather is dead? A. Yes.

Q. Judge Heney is dead? Yes.

Q. Mr. Townsend is dead? A. Yes. [360]

Q. Mr. R. C. Baker, President of the Borax Consolidated, is dead, is he not?

A. I don't know, but maybe he is.

Q. Mr. Whitney is dead? Yes.

Q. Senator Pittman is dead? A. Yes.

Q. Dr. Suckow is dead? A. Yes.

Q. Will you produce a copy of this statement by Mr. Muir about the monopoly against the Burnham Chemical Company?

A. You have a copy?

Q. I have a copy? A. Yes.

Q. While looking for that I will ask you whether or, Mr. Burnham, you did not testify in your deposition at Page 414 as follows. Will you turn to that, please?

A. Yes, I have it.

“Q. Why was it, Mr. Burnham, that the plaintiff, Burnham Chemical Company, was unable to employ Mr. Townsend——”

(Testimony of George B. Burnham.)

Mr. Carr: Now, Mr. Harrison, let me suggest that is not in any sense contradictory, to what he has said here. You have no right to bring in any part of this deposition except for impeachment purposes. Now, you have asked him this question and he has answered it, and what you are about to read from in the deposition is just practically what he has answered to you here.

Mr. Harrison: I don't think I have covered this precise matter. It is not offered for the purpose of impeachment.

Mr. Carr: You have asked him that at great length as to the question of being broke. We admit they were broke and hard up.

Mr. Harrison: If you won't interrupt me, Mr. Carr, I will try to reciprocate.

The Court: I will overrule the objection. Proceed.

Mr. Carr: Go ahead and ask the question. That is the quickest way to go on.

Mr. Harrison: Well, the objection is overruled.

Mr. Carr: That is good enough.

Q. (By Mr. Harrison): I will ask you if you did not testify as follows, Mr. Burnham:

“Q. Why was it, Mr. Burnham, that the plaintiff, Burnham Chemical Company, was unable to employ Mr. Townsend or Mr. Heney to continue the investigation in search for evidence to support your charge after 1929?

“A. Because we were practically broke and

(Testimony of George B. Burnham.)

what money we did have was sent to us by our stockholders for other purposes.”

You so testified? A. Yes. [362]

Q. And that is the fact?

Mr. Carr: He has already testified to that.

Q. (By Mr. Harrison): Now, the charge that is referred to in this testimony in the deposition was the charge of conspiracy in violation of the Anti-Trust laws, was it not?

A. What was the question? [362-A]

Q. I say the charge that was referred to in the testimony which I have just quoted was the charge that these defendants had injured you in violation of the Anti-Trust Laws? A. Yes.

Q. Whereas the charge I asked you about a few moments ago, and which Mr. Carr apparently thought was the same thing, was the prosecution of the Nevada suit with respect to the fraud order, isn't that true, do you get my point, Mr. Burnham? I will withdraw it.

The Court: I think you have made it clear. Ask him about a different subject now.

Q. (By Mr. Harrison): Is this the document that you handed to us, a copy of the Muir statement? A. Yes, that is it.

Q. That was enclosed, was it not, Mr. Burnham, with the letter you wrote Mr. Arnold in November, 1939? A. Yes.

Q. November 22, 1939?

A. November 22, 1939, yes.

Q. You gave it to Mr. Arnold. That is exhibit next in order.

(Testimony of George B. Burnham.)

(The document in question was thereupon received in evidence and marked Defendants' Exhibit AH.)

Mr. Harrison: This is the draft of Mr. Muir, stockholder of the plaintiff corporation, which Mr. Burnham forwarded to Mr. Arnold with his letter of November, 1939. It is a long [363] statement comprising some 35 pages. I only desire to read parts of it and if Mr. Carr wishes to read anything else in it, that is perfectly agreeable to me. It is entitled "Foreign-owned Monopoly vs. The People of the United States, By James Muir." It reads in part as follows:

"In his monopoly message to Congress on April 29th, 1938 President Franklin D. Roosevelt warned the Nation again 'Facism-ownership of Government by an individual, by a group, or by any other controlling power.' "

Later on that page:

"Fifteen years ago an inventor by the name of G. B. Burnham invited the general public to purchase stock in the Burnham Chemical Co. and share in some of the potash and borax wealth of the Nation."

The next page:

"Seven thousand American citizens, mostly people of small means, bought treasury stock in the Burnham Chemical Co. in the hopes of

(Testimony of George B. Burnham.)

sharing in some of the profits. But the borax industry was in the control of an English-owned borax trust and a competitor would be detrimental to the trust. So it happens that every time the infant enterprise made a little progress, the monopoly, or even some Government official, would hit the struggling infant over the head and down it would fall. Finally, in June 1937 some of the 7000 stockholders who resided in Philadelphia, [364] led by Mr. Frank B. Stockley, an attorney, asked the Government to aid the Company. Instead of getting aid, however, the 7000 American citizens, all people of limited means, some who had given their all to develop Government property, were given just another knock in the head.

“Now, who are they ‘in and out of the halls of Government who encourage the growing restriction of competition?’ Who are these people who are aiding monopoly in order that the rich can get richer and the poor get poorer?”

“Let us describe some of these potash and borax deposits and recite a little of the history of this Burnham Chemical Co.”

The next is headed “The Searles Lake Deposit,” and at the bottom:

“The mining claims of about 2240 acres on the mud flats were patented in the '70 and '80's and about 100 acres of these claims extended on to the crystal body. The claims are now owned

(Testimony of George B. Burnham.)

by the San Bernardino Borax Mining Co., Which is a subsidiary of the Pacific Coast Borax Co. The principal stockholders of the Pacific Coast Borax Co. are subjects of England. The Pacific Coast Borax Co. sell the 20 Mule Team brand of borax, the only package borax on the market, because the borax trust has apparently forced all others out of the field of competition.

“About 1908 the entire Searles Lake deposit was located under the placer mining laws by C. E. Dolbear and others [365] except for the patented lands above mentioned. The deposit was found to contain immense deposits of borax and soda. The company was organized to develop the property. The control of the company fell into the hands of another British corporation in 1909. The principal borax production of the world is made by these two British interests. Probably at the start these two companies were separate competing companies, but today it is believed that an office in London controls the two companies.”

On page 8:

“In 1918 eleven leases were awarded. One of the leases was granted to G. B. Burnham because he believed that solar evaporation could be economically used to evaporate the brine and thus make potash cheaply.

“In order to acquire a lease a bond had to

(Testimony of George B. Burnham.)

be put up to guarantee faithful performance of the terms of the lease. Bonds for about four of the leases were arranged for by the English-owned Pacific Coast Borax Co., including the bond for G. B. Burnham, who at that time (September 1918) was working for the Pacific Coast Borax Co. in carrying out experiments at Searles Lake to develop his solar processes. Mr. Burnham expected the Pacific Coast Borax Co. would finance his lease. Later, in 1919 the Pacific Coast Borax decided not to go ahead with the financing of any of the leases for which they [366] furnished bond. It, therefore, discharged Mr. G. B. Burnham, who was in their employ, in June 1919 and declined to aid him in the development of his lease, although they had arranged for an \$18,000 bond, so that he could get the lease. They also refused to help the other lessees for whom they had arranged bonds, stating that the World War had come to an end and the price of potash would soon go back to normal and that it would therefore not be feasible to make potash from Searles Lake brine even by the use of Mr. Burnham's solar process, although Mr. Burnham showed in his experimental reports that great economies could be made by large scale solar evaporation methods. But the making of large amounts of potash would also result in the production of large amounts of cheap borax and that would be detrimental to the borax trust. So, Mr.

(Testimony of George B. Burnham.)

Burnham was discharged from the employment of the Pacific Coast Borax Company.

“Shortly thereafter, in the fall of 1919, the Pacific Coast Borax Co., through their subsidiary, the San Bernardino Borax Mining Co., applied for 3102 acres of land suitable for building solar evaporation ponds at the south end of Searles Lake.”

“In their defense of their application for a patent to this clay land to build ponds to evaporate the brine by solar methods, the San Bernardino Borax Mining Co. [367] stated that ‘the commercial solution of the Searles Lake Potash problem is now believed to lie in the development of a process of solar evaporation. This process requires broad areas of shallow ponds with the necessary pipe-line connections.’

“Thus, the Borax Trust put itself on record to show that it realized the great possibilities of solar evaporation and the economies that could be effected. It endorsed the solar evaporation method upon which it had spent a year and a half of experimentation under the direction of Mr. G. B. Burnham. But apparently the trust reasoned ‘why develop a cheap process unless it can control its use?’ They reasoned that unless they had a large part of Searles Lake solar pond land they did not desire to encourage production by solar methods as it would only invite competition. Therefore, when they were denied this solar pond land as a result of the protest

(Testimony of George B. Burnham.)

of Mr. Burnham, and the other lessees, the borax trust took no further steps to develop the solar process although it had considerable solar pond land in the 2240 acres of land that were patented in the 70's. All the evidence points to a policy of the trust to either control the entire situation at Searles Lake, or else do nothing at all in hopes that no one else would do anything.

“But what greater endorsement of the solar method of [368] recovery of the salts from Searles Lake brine could be found than their application for 3102 acres of solar pond land and their statement under oath that ‘the commercial solution of the Searles Lake potash problem is now believed to lie in the development of a process of solar evaporation?’ The very process which a few months previous they had told Mr. Burnham they did not want to use and discharged Mr. Burnham from their employment. It also shows that Mr. Burnham was double-crossed. The trust wanted to use his process, but did not want to pay him anything for it.

“Their application also indicated an attempt to defraud the Government of royalties from production. This application for a pipe-line right-of-way from their patented land to this huge 3102 acre reservoir site, if it had been granted, would have given them a chance to drain the brine out of the Reserve with payment of no royalty whatever to the Govern-

(Testimony of George B. Burnham.)

ment. It certainly shows the character of the Trust, as wanting to grab it all and pay the Government nothing."

On the next page:

"Over 7000 people became stockholders in the Burnham Chemical Company. The financing of the company was going along rapidly when the Post Office Department of the United States Government, apparently inspired by misinformation [369] and evidently influenced by Stephen T. Mather, of the Department of the Interior and who was associated with the truth, imposed a Post Office Fraud Order upon the Company."

The next heading, "Stephen T. Mather's Letter."

"In the dilemma which the company found itself the Vice-President of the Company, Mr. Clarence Whitney, wrote to his old friend, Mr. Stephen T. Mather to see if Mr. Mather could lend his influence to help the Company. Mr. Mather was head of the National Park Service of the Department of the Interior."

Then he quotes the letter from Mr. Mather, which has already been introduced in evidence.

Page 15:

"The main point about the letter is that Mr. Stephen T. Mather admits that he was responsible, in a measure, for having the fraud order

(Testimony of George B. Burnham.)

issued. In other words, the president of a competing borax company, a subsidiary of the Pacific Coast Borax Co. and a man who held a high position in the Department of the Interior admits he was in a measure responsible for having a post office fraud order issued against a competitor.

“Mr. Mather speaks of having found the literature in London. The head office of the Borax Trust is located in London. Did the head office bring the literature to [370] his attention?

“Mr. Mather decries the ‘indiscriminate efforts to sell stock to men, women and children all over the world.’ Apparently he gave no thought to the wrecking of the new investment of 7000 ‘men, women and children’ who had already invested when he influenced the Post Office to issue the fraud order. He preferred to wreck the investment of these 7000 ‘men, women and children’ rather than go to the Company and tell them they were directing their efforts the wrong way, or that they should amend their method of selling. No! It was better to wreck the investment of 7000 than to go to the Company and tell them to change their methods of financing.

“Mr. Mather sets up nothing in his letter that shows there was fraud committed. He could find no fraud. The only thing that worried him was that the Burnham Chemical Co.

(Testimony of George B. Burnham.)

was a competitor to the Borax Trust with whom he was associated and their production would mean competition to his company and a loss of profits to himself."

The next is headed, "Price Cutting of Borax." Page 16, Mr. Carr.

"The destruction of the investment of 7000 stockholders in the Burnham Chemical Co. was a serious matter. The Post Office Department did not seem to give any thought to that either. However, in spite of the fraud order some [371] 2300 stockholders out of 7000 sent in small amounts of funds to the company by money order express to help the company in its financial difficulty. The original plans of the Company were to make potash, borax, soda, sodium sulphate and salt. However, because of the difficulty to get adequate funds they decided just to make borax. So, in the winter of 1927 and 1928 the stockholders provided funds to complete the Borax Unit and thus enabled the Company to begin production of borax in June 1928, just three costly years after the Fraud Order was imposed, and with the Fraud Order still against the Company. At last it looked as though the troubles of the Company were over. The borax plant was rehabilitated and completed in the spring of 1928, and in June actual production of borax was started. But the very month the Company started operation saw the beginning

(Testimony of George B. Burnham.)

of a price war between the two largest producers of borax (both English-controlled corporations) which drove the selling prices down to the unbelievable price of \$18.00 per ton F.O.B. plant. Borax had never sold for less than \$60.00 a ton before and this was some \$40.00 lower than borax had ever sold before in its history. No producer could make profits at that price and a new company like the Burnham Chemical Co., without financial reserves, could not continue indefinitely to carry the losses entailed in operation. It would appear that the cut in price of borax was purposely timed to start the very month the Burnham Chemical Co. started borax production. Did the two English borax producers conspire to start a price war the very month the Burnham Chemical Co. started production? Were the two companies price war directed by a common management in London?"

The next page, 18, headed, "U. S. Court Finds No Evidence of Fraud," contains the following statements, among others:

"With the stigma of the Post Office Fraud Order removed the Company made some attempts to raise money to build a three product plant and place itself on a more even footing with the borax trust. However, by this time, the world wide depression made further attempts to raise capital exceedingly difficult.

(Testimony of George B. Burnham.)

Some attempt was made to produce common salt in order to be on a self-sustaining basis, but without adequate funds even that was impractical."

"Apparently the Post Office had forgotten all about the matter and for two years, until September, 1927, the Company continued to receive its mail." It should be 1937.

"But in September, 1937 the Fraud Order was reinstated. The Company held its lease until January 31, 1938, when it was finally cancelled because the Company could not pay its rent.

"Why was the Post Office Fraud Order reinstated? [373] Let us look a little more into the history of this borax drama."

Page 20:

"On January 14th, 1926 it appears in the records that the mineral locators to the land sold to the United States Borax Co., the subsidiary of the Pacific Coast Borax Co., their rights to their mineral location."

"In a short time, on September 11, 1926, Mr. Austin, for some unknown reason, withdrew the application that he had pending since January 1926 with respect to the Northeast Quarter of this Section 24, and on the same day, September 11, 1926, the United States Borax Company filed its application, not for a sodium lease, but

(Testimony of George B. Burnham.)

for a mineral patent, alleging in the patent application that the land was valuable for 'boric acids bearing material,' and making no acknowledgment of the discovery of borate of sodium, covered by the Leasing Act of 1920. All information that they had found sodium borate was kept a secret so that they could get ownership. They purposely called it 'boric acid bearing material' so that the Government would not know they had found sodium borate.

"Thus the evidence shows that the foreign-owned interest deceived the Government as to the nature of the deposits and Mr. Austin was induced to withdraw this application so that the Borax Trust could get ownership to [374] the deposits and thereby deprive the Government of royalties.

"The Burnham Chemical Co. has contested the matter of ownership to some of the valuable sodium borate deposits in this Kramer borax district but it has been of little avail. The feeble protest of a penniless corporation carries little weight in a conflict with a wealthy trust with their retinue of lawyers and technical experts. The supreme reward of ownership to the largest deposit of sodium borate in the world was bestowed upon the Borax Trust contrary to the intentions of Congress. How extraordinary ineffectual is any protest against a wealthy trust.

"The Government was evidently deceived as

(Testimony of George B. Burnham.)

to the true nature of these deposits, but the Government apparently takes no steps to correct it. Every Friday night the virtues of 20 Mule Team Borax are broadcast over the radio, yet for every pound of borax sold the Government and the people of the United States have been deprived of the royalties which Congress intended the Government should have. In my opinion, the Austin sodium applications and their withdrawal, and the prosecution of patent to the land, and the withholding of information from the Government that sodium borate was found, is fraud, and it is the most cunning example of deception practiced upon the Government in the history of land office transactions. Not only was [375] the Government injured and consequently the People of the United States, but it enabled the Trust to grow more and more wealthy and to cut the price of borax and drive the Burnham Chemical Co. out of business."

The next heading is, "The Carlsbad Potash Deposits."

"Since 1910 the Government has spent about \$3,000,000 to find and develop potash deposits. Two potash deposits of commercial value have been found, namely, the brines of Searles Lake in California and deep mine at Carlsbad in New Mexico. Searles Lake was placed in a potash reserve by Presidential Proclamation on Feb-

(Testimony of George B. Burnham.)

ruary 21, 1913 and the Carlsbad potash deposits by Presidential Proclamation on March 11, 1926.

“The original New Mexico potash producer was financed in 1930 by the Pacific Coast Borax Co. and they also acquired six contiguous Federal potash leases of 2560 acres each in addition to large acreages of State leases on lands granted to the State of New Mexico. The United States Potash Company was organized to take over the properties and the control was placed in the hands of the foreign-owned Pacific Coast Borax Co.”

“Apparently as a reward for assisting them in getting control of this valuable potash reserve in New Mexico, Horace M. Albright, head of the National Parks Service of the Department of the Interior, resigned from this [376] position with the Government in 1933 and was immediately given the position of Vice-President and General Manager of the United States Potash Co. What stronger evidence than that could one want to show that there are people in the Halls of Government who have been taking active efforts to help this monopoly to get control of the potash and borax in this country?

“Let us look at the situation from another point of view. The acquisition through ownership of the Kramer borax lands by the Borax Trust not only deprived the Government of royalties but was an injustice to Government

(Testimony of George B. Burnham.)

lessees who were developing other borax lands and paying the Government rents and royalties. The Trust simply had the advantage of paying no royalty, while the Burnham Chemical Co. was paying rents to the Government on its lease to the potash and borax lands in Searles Lake.

“In fact, the injustice was doubly great because the Trust was owned by foreign stockholders while the Burnham Chemical Company was owned by American citizens.” And then there is quoted at page 29 a letter to the President of the United States, a letter written to the President of the United States, signed by the Chairman of the Philadelphia Stockholders’ Committee of the Burnham Chemical Company, dated July 17, 1937, to “His Excellency, Franklin D. Roosevelt, President of the United States.” [377]

I will read certain passages from that letter:

“Again the Government granted ownership to the largest sodium borate deposit in the world to the Borax Trust, a foreign-owned concern, contrary to the law and the intention of Congress giving the trust a strangle hold on the borax industry and enabling them to drive us out of the competitive field, at the time we started our production. Had the government not denied us our rightful portion of these known sodium borate deposits, we would have

(Testimony of George B. Burnham.)

been a prosperous company today. The Government itself is again to be blamed for the results being 'unsatisfactory and discouraging.' "

"It is further stated that the views of the Department relative to sodium, borax and similar mineral products is set forth in the decision found in I.D. Volume 54, page 183, case of Burnham Chemical Co. vs. United States Borax Co., etc. The Burnham Chemical Co. has appealed from such a decision in a document recently sent to you. The title to the document is:

" 'Appeal to the Supervisory Executive Jurisdiction of the President of the United States from Refusal by Department of the Interior to Grant to Appellant a Sodium Lease upon Certain Lands, and Protest Against Issuance of Sodium Lease to Existing Monopoly After Denial of Appellant's Application Upon Ground that Existing Monopoly [378] had at that Time Already Applied for Mineral Patent Upon Said Land.' "

Then on page 32:

"Instead, however, the Post Office Fraud Order against the company was immediately reinstated in September, 1927, and the Company's lease cancelled. 'Someone in the Hall of Government surely took advantage of the technical situation of the Burnham Chemical Co. who only had a temporary injunction

(Testimony of George B. Burnham.)

against the Postmaster at Reno, Nevada. Their suit was dismissed in 1935, due to lack of prosecution by the Company, which was financially broke and it could not defend itself. Yet the Company continued to receive its mail just the same for over two years thereafter."

Page 33, "Evidence by Induction"

"Through inductive evidence one can reason that when foreign-owned companies get all the breaks and yet 7000 American citizens get all the knocks there must be some one in the Halls of Government that is helping the foreign-owned interests and deliberately blocking the efforts of 7000 American citizens.

"What stronger evidence would one want to show that there are such people in the Halls of Government when a high official in the Department of the Interior is made an officer in the British Borax Trust soon after control of [379] the Carlsbad potash deposits were obtained by the Trust?

"What stronger evidence would one want to show that the British Borax Trust itself was behind the various steps that have been taken to defeat the Burnham Chemical Co. and that it used the Government as a tool to accomplish it; that it induced the Post Office to issue a Fraud Order against the Burnham Chemical Company in order to eliminate a competitor, when Stephen T. Mather, a member of the

(Testimony of George B. Burnham.)

Borax Trust, admits that he was, in a measure, responsible for the Fraud Order?

“The Post Office Department, way back in 1925, said there were some statements in the company’s literature to sell stock, which were false (although every statement was true) and so it issued a Fraud Order against the Company and refused to deliver its mail, when there was no false statement and no fraud had been committed and thereby practically destroy the Company. But suppose there had been a statement in the Company’s literature that was not true, there was certainly no intention on the part of the management to deceive the public. Wasn’t it a bigger crime on the part of the Government to wreck the investment of 7000 stockholders just because it thought some statement was not true? It would be a thousand times better to point out the error and ask the Company to correct it, but the Government did not do that. It called for a hearing in Washington, D. C. The attorney [380] for the Company pointed out that all the statements in question were true, but the Government issued a Fraud Order just the same. It did not ask the Company to correct any statements. Does that not show that there was some other motive behind the issuing of that Fraud Order?

“In my opinion, it is inconceivable that our Post Office Department would issue a Fraud Order against the corporation and destroy the

(Testimony of George B. Burnham.)

investment of 7000 stockholders without first asking the corporation to change any statement the Government thought was incorrect. A fair-minded Government would not do such a thing and therefore it must have been the Borax Trust behind the Fraud Order, just as Stephen T. Mather's letter shows.

"Even if the Department of the Interior denies that it has been made the tool of the foreign-owned Borax Trust it makes no difference."

On the final page: "Constructive Action Needed."

"The solution to the difficulties now lay in constructive action by the Government to assist those 7000 American citizens to built a plant at Searles Lake, California. A plant of sufficient size to compete with the Borax Trust and offset British interests draining the American potash reserve.

"If the Government will adequately finance the stockholders [381] on a potash lease at Searles Lake the royalties accruing to the Government will ultimately far exceed the amount of the investment. In that way the Government will get some benefit from this potash reserve whereas it gets no benefits now from the Borax Trust at Searles Lake because the Government gave them ownership and deprived itself of royalties.

"Furthermore, 7000 citizens in the United

(Testimony of George B. Burnham.)

States would be getting profits instead of citizens in foreign lands. Their income can be taxed, but the income of foreign stockholders residing in foreign lands cannot be taxed.

“It is the Government’s duty to build up the wealth of our own citizens and not the wealth of foreigners.

“It would be a constructive step not only to help overcome the present condition in which, out of ‘every 300 persons in our population, one person received 78 cents out of every dollar of corporate dividends, while the other 299 persons divide up the other 22 cents among them.’ Also to prevent a British monopoly getting 100 cents out of every dollar of borax and potash profits.”

Mr. Carr: What is the date of that?

Mr. Harrison: That is undated, but the witness has testified it was given to him in 1938 by Mr. Muir. That is all the cross-examination, if your Honor please, unless I think of something.

The Court: We will take an adjournment until tomorrow morning at ten o’clock. In the meantime I will ask you to remember it is your duty not to discuss the case among yourselves or with anybody else or to form or express an opinion on the matter until it is finally submitted to you.

(An adjournment was thereupon taken until tomorrow, Wednesday, April 2, 1947, at 10:00 o’clock a.m.) [382-A]

Wednesday, April 2, 1947, 10:00 o'Clock A.M.

The Clerk: Burnham Chemical Company vs. Borax Consolidated.

Mr. Harrison: If your Honor please, we have concluded our cross-examination.

GEORGE B. BURNHAM

recalled.

Redirect Examination

By Mr. Carr:

Q. Mr. Burnham, referring to Defendants' Exhibit 8, which is the letter to Mr. Thurman Arnold, how did that happen to be written?

A. At the request of Mr. Berge, Wendell Berge.

Mr. Carr: I do not recall whether all of that letter was read.

Mr. Harrison: Yes.

The Court: Yes, I think Mr. Harrison read it fully and went back over it again.

Q. (By Mr. Carr): You state in such letter, Mr. Burnham, that these attorneys who are now both deceased felt that we had a case, but we were so completely ruined as a result of the price war and also in debt that we were financially unable to employ the attorneys to go ahead with the matter. That letter had reference, did it not, to the price cuts? A. Yes. [383]

Q. And that is about all that it did have reference to? A. Yes.

Mr. Harrison: I object to that on the ground it speaks for itself.

(Testimony of George B. Burnham.)

The Court: Yes, I will sustain the objection.

Q. (By Mr. Carr): When did you have that consultation with your attorneys in which they stated that they felt that you had a case, do you recall?

A. That was along about August, July—July or August, 1928.

Q. And who were those attorneys?

A. Mr. B. D. Townsend and Mr. Francis J. Heney.

Q. Did they at that time explain in any way or for what reason they felt that you had a case?

A. Well, they felt that we had a case if we could get the evidence that there was any violation of the law, that we would have to find the evidence first.

Q. Did they tell you that you would have to find the evidence?

Mr. Harrison: I object to that on the ground it is highly leading, if the Court please.

Q. (By Mr. Carr): Did they or did they not——

Mr. Harrison: Same objection. The witness may be asked for the conversation. This is hardly the method to introduce——

Mr. Carr: We withdraw the question.

Q. What was the conversation in full, as nearly as you can remember it at this late period, Mr. Burnham, that occurred [384] at that particular time?

A. The price of borax had just dropped the month before, and we conferred with our attorneys

(Testimony of George B. Burnham.)

on the situation, and they said it was very peculiar that the price should fall just when we were starting production, and that it might indicate that there was some violation of the Sherman Anti-trust Law, but they would have to investigate to find out, find evidence first before they could do anything about it.

Q. Was there anything else said about the investigation?

A. Yes, they said not to discuss the matter among ourselves because they didn't want any information to get over to the competitors, and furthermore there was no need of talking about the subject until we had some facts.

Q. You also stated in that letter, "that we were financially unable to employ the attorneys to go ahead with the matter." What did the word "matter" refer to in that letter?

A. That referred to making investigations to find any evidence of violations, violating the Sherman Anti-trust Law.

Q. That did not refer to the prosecution of an action, did it? A. No.

Mr. Harrison: I object to that, if the Court please, on the ground it is highly leading.

The Court: Yes, it is a leading question. Sustained.

Q. (By Mr. Carr): Was the Burnham Chemical Company in finances at that time? [385]

A. No, because the price of borax had dropped

(Testimony of George B. Burnham.)

and we were in a precarious position. We were selling borax——

Q. But you were not entirely broke?

A. No, we were not entirely broke, but we were selling borax at the bare cost of production in August. We were just swapping dollars.

Q. What were you using your money for?

A. That money that had been sent to us by stockholders was for a definite purpose.

Q. What was that?

A. The construction of the plant and the operation of the plant, and not for any other purpose.

Q. After that conversation did you continue with any investigations or make any investigations to ascertain any of the facts suggested to you by these gentlemen?

A. Yes.

Mr. Harrison: That is objected to as immaterial, if the Court please, and I anticipate there may be a good many other questions on that ground. We submit it is immaterial what investigations were made. The question is what knowledge he had.

Mr. Carr: The question of whether he made little or no diligent or otherwise investigation we submit is material.

The Court: You are going to ask another question now instead of that one, Mr. Carr? [386]

Mr. Carr: No. Will you be good enough to read the question?

The Court: The answer may go out.

(The question was read by the reporter.)

(Testimony of George B. Burnham.)

Mr. Carr: We suggest that is proper because it is our duty to go ahead. I will withdraw the question and precede it with this question:

Q. At that time did you have any knowledge that these defendants, or, rather, the two of them involved, were violating the Anti-trust Law, or that this price cut had actually been brought about by conspiracy entered into by these two defendants?

A. No.

Mr. Harrison: That is objected to as being leading, if the Court please.

Mr. Carr: I am asking him if he has any knowledge. You said we have to prove knowledge. I want to prove that first.

The Court: The question you ask him now calls for his opinion and conclusion, does it not?

Mr. Carr: No, if he knows.

The Court: He already testified on direct examination that he had no knowledge on the subject, and then there was cross-examination as to facts over a long period of time. Now you are asking him the same question again that you asked him on direct examination.

Mr. Carr: No, this is a little different. I asked him [387] on direct, if it please your Honor, whether or not between the dates indicated he had any knowledge of the conspiracy. I am asking him now as to a specific conspiracy. The attempt was made by counsel in his very able cross-examination to show that we did have knowledge that these two defendants had conspired to bring about this price

(Testimony of George B. Burnham.)

cut. I want to refute that by his testimony, if we can, if he can so give it, that he had no such knowledge, and then I will follow it with an inquiry as to whether he made, pursuant to the suggestions of Mr. Heney and Mr. Townsend, any investigation. He cannot just sit down and do nothing. We want to prove he did go ahead and do his best to discover and find out some of the evidence suggested by Mr. Heney and Mr. Townsend, so as to show that he was diligent.

The Court: I do not know whether the question of diligence has anything to do with it.

Mr. Carr: Oh, if a man in a situation of this kind, may it please your Honor, has any intimation of even such things as the price cuts existing, and he has testified he was somewhat suspicious——

The Court: He has already said they did not have the money to go ahead and do that.

Mr. Carr: No, they did not have the money to afford the attorneys for such purpose, but what he did, I am asking him now, if it may please your Honor, what he did personally, [388] whether he carried on. The fact that he did not have the money to employ the attorneys, or rather, wished to use the money which he had for other purposes, the development of the plant rather than the employment of attorneys to make the investigation, certainly does not preclude him from investigating, himself, personally.

The Court: Suppose the testimony shows that he, himself, tried to investigate this matter and found out nothing?

(Testimony of George B. Burnham.)

Mr. Carr: He could get no action anywhere.

The Court: Never mind about getting action some place, but he, himself, found out nothing.

Mr. Carr: That is right.

The Court: How would that be germane to this issue?

Mr. Carr: It would show that he had no knowledge. He did not acquire any information as to the actual existence. It is not what he suspected or the suspicion which might have rested in his mind. It is the actual knowledge of the cause of action which he had. Your Honor, according to your pre-trial order on that very word "believe," which you have placed in that order gives us a right, we believe, to go ahead and show that we did everything that we could to ascertain whether or not we could secure any proof of the conspiracy. Now, they have gone very fully into it on cross-examination. They have done everything they could, Mr. Harrison very ably has, with the benefit of his people, to prove that we did nothing, your [389] Honor, just laid down.

The Court: I will overrule the objection subject to a motion to strike, and we will see what this testimony amounts to.

Mr. Harrison: If your Honor please, we should like to have the opportunity to present to your Honor, if your Honor is in doubt, the reasons why we believe the question of diligence is utterly immaterial. I do not think your Honor is in doubt.

(Testimony of George B. Burnham.)

The Court: I do not consider that that is a material aspect at all of the case, but on the question of knowledge—I assume since counsel asked the question he expects the witness to say he did everything in his power to find out and he didn't find out anything.

Mr. Carr: Your Honor is a mind reader.

Mr. Harrison: I assume so, your Honor.

The Court: That being the case, it might save a long line of examination if, subject to the court finally passing upon the materiality of that, it might be deemed that the witness would so testify, if that is the fact. I am just thinking in terms of saving the legal point and perhaps passing upon it when we finish with the evidence.

Mr. Harrison: The question, as I understand it now, that is directed to the witness was whether he knew. That, of course, has been asked on direct examination already. [390]

Mr. Carr: Not this specific one, Mr. Harrison. I asked him generally, following the pre-trial order, as to the dates, and asked him if he knew of the conspiracy, and you examined him at great length and attempted to show to the jury that because the price cuts occurred, why, we knew about the conspiracy. Now, the conspiracy is the basis of this action.

The Court: I know all that. I will overrule the objection. You ask him what question you have in mind. You can renew your objection, Mr. Harrison, and we will see how far we get with that.

(The question was read as follows:

(Testimony of George B. Burnham.)

“Q. At that time did you have any knowledge that these defendants, or, rather, the two of them involved, were violating the Anti-trust Law, or that this price cut had actually been brought about by conspiracy entered into by these two defendants?

A. No.”)

Q. (By Mr. Carr): After this conversation with Mr. Heney and Mr. Townsend did you make any investigation to determine whether or not such price cut was brought about by the endeavors or plans of the two defendants in question, and by the two defendants herein—I mean the Pacific Coast Borax Company and the American Potash & Chemical Company?

Mr. Harrison: That is objected to as irrelevant, incompetent and wholly immaterial, if the Court please. [391]

The Court: I will sustain that objection. You can ask him what he did.

Q. (By Mr. Carr): Mr. Burnham, after you had this conversation with Mr. Heney and Mr. Townsend did you do anything on the matter, yourself?

Mr. Harrison: That could be answered “Yes” or “No,” I assume.

Mr. Carr: Yes.

The Witness: I did a great many things.

Q. (By Mr. Carr): What were they?

Mr. Harrison: Now, if the Court please, I assume counsel intends by this question to prove ex-

(Testimony of George B. Burnham.)

actly what he offered to prove by his leading question a moment ago, and we therefore object to that on the ground that it is incompetent, irrelevant, and immaterial. Counsel's statement indicates that his purpose is to show diligence, and we submit that diligence is wholly immaterial in this case. Whether diligent or not, the question is what he knew, what he learned, and we therefore object to the question in view of counsel's evident and frank purpose, as being incompetent, irrelevant, and immaterial.

Mr. Carr: It is not a question of diligence. It is a question of whether he knew. Well, let me ask another question. Maybe it will clear the situation.

The Court: All right.

Q. (By Mr. Carr): As a result of those many things which you [392] say you did, did you ascertain whether or not these two defendants referred to had entered into a conspiracy or plan or scheme to cut the price?

Mr. Harrison: That is objected to on the ground it calls for the conclusion of the witness.

Mr. Carr: No, what he thought, what he found out.

Mr. Harrison: If the question is whether he learned a specific thing, that is one thing, but here is a question that obviously calls for the witness' conclusion.

Mr. Carr: We will go at it in another way.

Q. In the course of those many things which you

(Testimony of George B. Burnham.)

say you did, did you find out or ascertain whether or not these defendants had so conspired?

A. No.

The Court: I think that these questions are purely matters that you may argue either to the court or the jury at a later time, but it is the facts, what was done, that are germane to the matter, not what the witness thinks he learned.

Mr. Carr: Being put on notice, your Honor, it was his duty to go out and endeavor to ascertain whether such conspiracy existed.

The Court: I do not concede that there is any such law as that, that there is any duty on anybody to investigate anything. If a person has a knowledge, knows or has cause to believe that he has a cause of action against somebody else, or he hasn't, [393] there isn't any duty that rests upon him. If he does not protect his rights, he is not responsible to anybody except himself.

Mr. Carr: In a matter of this kind, as we read the California cases, and also the case of Foster & Kleiser, the duty rests upon a party in his position to endeavor to act and to ascertain. Well, will your Honor rule upon it, so we may have a record?

Mr. Harrison: We object to the question on the ground it is incompetent, irrelevant, and immaterial.

The Court: I will sustain the objection to the last question.

Q. (By Mr. Carr): Did you, as the result of those many things which you stated you did, believe

(Testimony of George B. Burnham.)

that you had a cause of action against these two defendants for conspiracy for the price cut which existed?

A. No, I did not believe it because——

Mr. Harrison: Just a moment. May that go out until I have a chance to object?

Mr. Carr: Yes, that may go out. Don't answer.

Mr. Harrison: I object to that on the ground it calls for a conclusion.

The Court: I will allow the answer to stand and I will reach this matter when it is argued later. You have in the record what you want on that point.

Mr. Carr: Yes, your Honor. May I see Exhibit H?

Referring to Exhibit H, which is the letter to the Secretary of the Interior, dated November 18, 1939. I think with your Honor's permission and with the courtesy of the jury I would like to read this letter as a whole. [394-a]

Mr. Carr: (Reading):

“Washington, D. C., November 18, 1939

“Secretary of the Interior,
Washington, D. C.

Sir:

“I understand that the American Potash & Chemical Corporation, of Trona, California, has applied for leases on potash lands in the Searles Lake Potash Reserve, in addition to 3,319 acres of patented land which they already own. Its application for

(Testimony of George B. Burnham.)

leases was made as a result of bids which the Commissioner of the General Land Office advertised for the leasing of the Searles Lake Potash Reserve under date of August 22, 1939. It is my understanding that two companies have placed bids, namely, the West End Chemical Company and the American Potash & Chemical Company, which are the two companies now operating at Searles Lake; and that practically the remaining portion of lands available at Searles Lake will probably be given to these two bidders.

“As President and a Stockholder of the Burnham Chemical Company and as a citizen of the United States, I protest the granting of any further potash lands, through lease or otherwise, to the American Potash & Chemical Co.; and I make this protest on behalf of 7,000 American citizens [395] who are stockholders of the Burnham Chemical Company. The reasons for my protest are as follows:

“(1.) The American Potash & Chemical Corporation and other fertilizer producers are now being investigated by the Anti-Trust Division of the Department of Justice for alleged violation of the Sherman Anti-Trust Laws. This corporation is a foreign-owned Company with about 80% of its stock held by foreign citizens residing in England. The corporation, together with another British-owned potash and borax producer in the United States, constitute a formidable monopoly of the potash and borax industry of this country. The

(Testimony of George B. Burnham.)

American Potash & Chemical Corporation already has 3,319 acres of land at Searles Lake, Calif., which it owns outright. It should not be granted additional land and thereby increase its monopoly, especially while it is being investigated by the Department of Justice. In fact, the granting to it of additional potash lands may ultimately give the British interests a strangle hold on the entire potash industry in this country.

“Both potash and borax are scarce. Potash is an essential fertilizer and is used by most farmers. Borax in one form or another is used by nearly everybody. There should be no monopoly of these important chemicals, and certainly no monopoly in foreign-owned hands. [396]

“We as a Nation are glad that we are not now dependent upon European potash as we have been in the past. We are inclined to boast about it. Yet, after all, most of our domestic potash production is controlled by Europeans. And the granting of more land to the foreign-owned interest may end up in Europe’s entire control of the industry in America.

“Certainly they should not be granted more land while the Anti-Trust Investigation is being conducted by the Department of Justice.

“(2.) At the time the American Potash & Chemical Corporation (or its predecessors) secured patent to its land in the Searles Lake Potash Reserve the granting of patents to its land was protested by the Land Office on the grounds that its Placer

(Testimony of George B. Burnham.)

Claims, under which they claimed the land, were in default due to the fact that they did not keep up their assessment work and that there never had been any law permitting mineral location of brines, and that they were aliens and not entitled to any of the public domain. Judge E. C. Finney states in his memorandum of November 27, 1917, on the matter of granting this land to this alien corporation, the following:

“(1) I believe that the Department should squarely hold, under the facts in this case as presented, the [397] solution carrying potash and other minerals is not of the character contemplated to be covered by mining laws and not subject to location and entry thereunder.

“(2) ‘I believe that the Department should hold that the Austin locations are invalid because made at a time when the Trona corporation was owned and controlled by aliens, and that the net result of those locations was for and in the interest of such aliens. There was such control at date of location and that control continues down to the present time, with the net result that if patents were issued the title, while not passing directly to the aliens, would inure to their benefit.

“‘It is true that Assistant Attorney General Van Devanter in a letter to the Secretary of State a number of years ago held that a company incorporated under the laws of the United States was entitled to take and hold mining lands, irrespective of the nationality of its stockholders. This, however,

(Testimony of George B. Burnham.)

was a mere opinion of a law officer and is not binding upon the Secretary of the Interior or upon the courts. Furthermore, it is a narrow construction, based upon the letter of the law and not upon its purpose and intent.

“ ‘Section 2319, Revised Statutes, expressly provides that mineral deposits of the United States are subject to occupation and purchase “by citizens of the United [398] States and those who have declared their intention to become such.” There can be no doubt but that this evidences a clear intent on the part of Congress that title to our public mineral lands should not pass to aliens. This is not an isolated instance, but is in harmony with other public-land laws which make similar requirements. The Homestead laws contain like requirements, and proof that a homestead entry is being made, directly or indirectly, for the benefit of aliens would result in its cancellation.

“ ‘Judge Lindley points out that this corporation was not only organized under the laws of the United States but that the incorporators were all citizens, and that this was the status at the time the so-called Dolbear locations were made. We have nothing whatever to do with the Dolbear locations. They are abandoned. The claim for patent does not rest upon them, but upon the Austin locations made in 1911, at a time when the company was controlled by aliens.

“(3.) ‘The mining laws never contemplated that one individual or one corporation should make hun-

(Testimony of George B. Burnham.)

dreds of contiguous locations upon a given deposit in a single day. Such a proceeding is antagonistic to fair play and entirely contrary to the spirit of the mining laws and [399] customs. It is a self-evident intent to monopolize deposits, to the detriment of the general public and of others interested in the development of mineral resources.

“(4.) ‘Believing as I do that this case should be disposed of with due regard to the spirit of the mining laws and their purpose and intent, in the interest of the general public. I believe that the Government should do equity to the extent of recognizing the fact that these claimants have expended a large sum of money in the building of a railroad and plant for the reduction of the product, and should, in denying their application for patent, afford an opportunity to take one or two leases of the maximum area under the act of October 2, 1917, provided the parties in interest can qualify as lessees under the act.’

“Therefore, inasmuch as its rights to own land in the Searles Lake Potash Reserve was questionable in the first place, it certainly should not have additional land, even though it may be leased land.

“(3.) The Burnham Chemical Company was granted a lease on lands at Searles Lake. The Company is composed of 7,000 American citizens. It proceeded with the development of its lease by raising money through the mails. The literature it sent through the mail was based upon [400] facts, and was truthful, and yet the Post Office issued a fraud

(Testimony of George B. Burnham.)

order against the company, in 1925, denying it the use of the mail. Our supply of funds, the life blood of the company, was cut off. The company defended itself in the U. S. District Court, at Carson City, Nevada, and asked for a temporary injunction against the Post Office fraud order. The Court handed down a decision in favor of the Burnham Chemical Co., as it saw no evidence of fraud. It granted the Burnham Chemical Co. a temporary injunction. This Post Office fraud order, of course, made it extremely difficult for the Burnham Chemical Co. to raise any funds thereafter. However, the company did manage to raise sufficient money to build part of its plant and produce borax; and 1,400 tons of 99½% pure borax was produced. But, the very month our production started, in June, 1928, the American Potash & Chemical Corporation and the Pacific Coast Borax Co., both foreign-owned companies, began cutting the price of borax from approximately \$60.00 per ton f.o.b. Searles Lake to about \$18.00 a ton. Our cost of production was \$26.00 per ton, so, when the price fell below \$26.00, we were losing money—and we had to close down our plant. After we stopped our small production the price went up. This further discouragement of the efforts of American citizens to develop the country's natural resources was such that [401] we were unable to pay even the rent on the lease and, therefore, the Department of the Interior cancelled our potash lease.

(Testimony of George B. Burnham.)

“It is a very significant fact that we produced 1,400 tons of 99½% pure borax by solar evaporation methods, and without the use of any fuel oil whatsoever. It is even more significant when it is realized that this was a small capacity plant which made this production and that only one product was made instead of several products. If capital had been available so that other products could have been made at the same time, the cost per ton of borax would have been much less because part of the cost of production would have been distributed over the various chemicals that were produced. Yet, if the Company had not been denied the use of the mails, ample capital would have been available. It is evident that the foreign-owned borax interests realized that if the solar methods of production got an adequate start they could become serious competitors to themselves; it would break the British Monopoly of the potash and borax industry in this country; and so this drastic cut in the price of borax was aimed at us, to drive cheaper methods of production from the field. The new source of borax in the Kramer Borax fields was the excuse of the Borax Trust for cutting the price of borax, but that field had been in production for a year before we started production. [402] Furthermore, after we stopped our small production, the price went up. Our being driven from the field of production was a detriment to the country as a whole, as well as to the 7,000 American citizens which our company is composed of, who were developing these valuable resources. Foreign interests drove us out.

(Testimony of George B. Burnham.)

“Therefore, it is not fair to American citizens to grant further lands to foreign interests who have, through unfair methods of price reduction, driven American enterprise out of the field of endeavor.

“(4.) The American Potash & Chemical Corporation consumes vast quantities of fuel oil to evaporate the brines of Searles Lake. This consumption of fuel oil could be saved if the salts of the Searles Lake were recovered by solar evaporation. We have contended that the chemicals of Searles Lake can be obtained most economically by solar methods, the same as salt is obtained from Sea water around San Francisco Bay, or as potash is obtained from the solar evaporation of the brines of the Dead Sea, in Palestine. Our engineers have concurred in that opinion. Where the sun is used to evaporate the brine, as in San Francisco Bay, the cost of recovering the salt, on a large scale production, is approximately \$3.00 a ton. A similar, though perhaps somewhat higher figure, should apply to the cost of producing potash at the Dead Sea. Although the cost [403] of production of potash at Palestine is not definitely known, it is reasonable to believe that the cost must be in that neighborhood or it would not be possible for the Dead Sea producer to recover its potash and haul it by truck, over hazardous roads, to the shores of the Mediterranean and ship it by boat to the United States, in competition with domestic potash production. It might be said that labor is cheaper in Palestine. But the solar process need not use much labor if machinery is used to harvest the potash.

(Testimony of George B. Burnham.)

“In 1937, about 28,000 tons of potash, produced by solar evaporation, was exported from the Dead Sea in Palestine. So, it is evident from that fact that their cost of potash production by solar evaporation is extremely low.

“The recovery of the chemicals of Searles Lake by solar evaporation would help to conserve the fuel oil supply of the United States and, at the same time, would provide the farmers with potash at a lower cost than what they now pay.

“Therefore, it is not in the interests of conservation to use artificial evaporation of Searles Lake brine with its vast consumption of valuable fuel oil as now practiced by the American Potash & Chemical Co. when cheaper potash can be made by solar evaporation. If the [404] solar evaporation method is cheaper at the Dead Sea it should be cheaper at Searles Lake also.

“We believe that it was the influence of foreign-owned interests in the Halls of Government which was behind all the difficulties of the Burnham Chemical Co. in the development of its potash lease at Searles Lake. The reasons we are led to believe this are as follows:

“Stephen T. Mather was, at one time, Chicago Manager of the Pacific Coast Borax Co., and was Assistant to the Secretary of the Interior from 1915 to 1917, and was a Director of the National Parks Service of the Department of the Interior from May 16, 1917, up until his death, about 1930. (See *Who's Who in America*, 1926.) While he held this

(Testimony of George B. Burnham.)

high Government position, he was also Vice-President of the Sterling Borax Co., which is a subsidiary of the Pacific Coast Borax Co., a foreign-owned enterprise. Stephen T. Mather admits that he was in a measure responsible for the Post Office Fraud Order being issued against the Burnham Chemical Company, in a letter dated October 8, 1926, written to Clarence Whitney, one of the Directors of the Burnham Chemical Co. A copy of his letter is enclosed.

“If Mr. Mather felt that our literature was at fault, or if the Post Office Department felt that way, why did they not ask us to correct our literature? We [405] would have been only too willing to do so, if there was anything wrong. Why ruin the investment of 7,000 American stockholders just because some sentences in the literature, they thought, were incorrect? As a matter of fact, there was no misstatement. Stephen T. Mather, in his letter, does not point out any fraud but his letter does contain certain statements which are not true.

“Mr. Mather admits in his letter that our ‘process may be all right.’ If the process is all right, then the profits are possible. In fact, the very Borax Trust itself endorsed the solar processes. In the Fall of 1919, the Pacific Coast Borax Co., through its subsidiary, the San Bernardino Borax Mining Co., applied for 3,102 acres of land suitable for building solar evaporation ponds at the south end of Searles Lake. (U. S. Land Office file Independence 06109.) Also a pipe line right of way was

(Testimony of George B. Burnham.)

applied for, leading from the 100 acre corner of the crystal body held under patent by the San Bernardino Borax Mining Co. to this proposed reservoir land. It was very evident that the purpose was to drain the brine out of the Government Potash Reserve from their 100 acres of patented land on the corner of the crystal body. It was likewise their plan to recover the potash and other salts by solar evaporation methods on a huge scale. [406]

“This obvious scheme to drain the brine of Searles Lake by pumping from their patented land, and deprive the Government of royalties on their production was protested by Mr. Burnham and the other lessees. In its defense of its application for a patent to this clay land to build ponds to evaporate the brine by solar methods, the San Bernardino Borax Mining Co. stated that ‘the commercial solution of the Searles Lake potash is now believed to lie in the development of a process of solar evaporation. This process requires broad areas of shallow ponds with the necessary pipe line connections.’

“Thus, the Borax Trust put itself on record to show that it realized the great possibilities of solar evaporation and the economies that could be effected. It endorsed the solar evaporation method upon which it had spent a year and a half of experimentation under the direction of Mr. G. B. Burnham.

“Mr. Mather himself admits the process may be all right and the foreign-owned Borax Trust itself endorses the process. And so they were afraid we

(Testimony of George B. Burnham.)

would be a formidable competitor, and Mr. Mather influenced the Post Office to issue a Fraud Order so we would not raise funds. Mr. Mather was a high Government official and also an officer and stockholder in the British-owned Borax Trust.

“Later, because we could not raise funds and pay our rent, the Government cancelled our lease. Now, the other foreign interests want our land which we formerly held under lease.

“A great injustice has been done to the 7,000 American citizens, who are stockholders in the Burnham Chemical Co. and who have invested over \$1,000,000 in the substantial development of the Searles Lake deposits. That injustice should be corrected but it cannot be corrected by giving British interests more land.

“At the time the Carlsbad Potash Leases were issued in New Mexico, I understand foreign interests secured control of six of the seven leases—although it was against the public interest to permit foreign interests to control so much of the Government New Mexico Potash Reserve. I believe there was some protest about it at the time. However, a new company was formed to develop the leases, called the United States Potash Co., and this company is a subsidiary of the Pacific Coast Borax Co., and therefore is still a foreign-controlled company. Soon after the leases were granted and the new company was formed, Mr. Horace M. Albright, Director of the National Parks Service in the Department of the Interior, was made Vice-President

(Testimony of George B. Burnham.)
and General Manager of the United States Potash Company. Mr. Albright resigned [408] from his position in the Department of the Interior on August 10, 1933, and immediately became Vice-President and General Manager of the United States Potash Company—a foreign-owned company. (See *Who's Who in America*, 1938.)

“This incident shows a further connection between foreign-owned interests and Government officials which lead us to believe the foreign-owned interests have more than once used their influence in the Halls of Government to drive out American competition and that they have obtained more and more of the borax and potash of this country, to the detriment of American citizens.

“Surely the Government cannot continue this practice of giving foreign-owned interests more and more of the potash and borax lands of this country by now granting more lands at Searles Lake to foreign-owned interests.

“The American Potash & Chemical Corporation owns about 15% of the Searles Lake surface. The 85% remainder is owned by the Government. In taking anything from the lake, this foreign-owned company is able to drain the Government-owned portion as well as the part it controls. It is making a production of over \$6,000,000 worth of potash, borax and other chemicals every year; and its profits are about \$2,000,000 annually. Therefore, [409] 85% of the \$6,000,000 annual production is being drained away from Government land. In order to

(Testimony of George B. Burnham.)

offset this production and prevent Government brine being drained away, the Government lessees should be producing 85% of the total production that is annually made from the Searles Lake deposits.

“So the Government is considering permitting the American Potash & Chemical Co. to lease the Government lands at Searles Lake in order to prevent the brine from being drained onto patented lands, and thus derive a royalty on production by inducing the company to pump from leased land instead of the company’s patented land.

“Now, if the Government granted leases on the Searles Lake Potash Reserve to the American Potash & Chemical Co., would the corporation be willing to curtail its pumping from its patented land to 15% of the total brine pumped from Searles Lake in order that the brine pumped from leased land would be 85% of the total? In other words, would it be willing to make its production from leased lands, plus the production of the West End Chemical Co. (the one other lessee at Searles Lake) equal to 85% of the total production so that the Government would get a 3% gross royalty on 85% of all the chemicals produced from Searles Lake?

“Let us assume they would be willing to do this; [410] then the Government’s brine would not be drained from the Reserve and the Government would at least get its full share of royalties.

“But royalties are not the only thing the Government should consider. If all the chemicals of

(Testimony of George B. Burnham.)

Searles Lake were recovered and sold at present wholesale prices, they would be worth well over ten billion dollars (\$10,000,000,000.00). It would be a pity indeed to let foreign stockholders derive most of the profits from that much wealth instead of American citizens. The income of American citizens can be taxed to support the Government, but the income of foreign citizens cannot be taxed. The wealth of foreign citizens would be increased, but not the wealth of American citizens, which is far more important.

“So, if the Government permits the American Potash & Chemical Corporation to lease much of the remaining lands at Searles Lake (it would eventually get about \$300,000,000.00 royalty on production from those leased lands but the profits will go to English stockholders. The West End Chemical Co. production is small compared to that of the foreign-owned interest. Therefore, the Government would lose the taxable income about three billion dollars dividends (\$3,000,000,000.00 dividends) that otherwise could go to American citizens, [411] besides the taxable increased wealth to our Nation which this added wealth to American citizens would create; and, at the same time, let British interests build up a huge monopoly.

“Furthermore, the taxable three billion dollars (\$3,000,000,000.00), worth of increased wealth to American citizens is forever taxable. Year after year it can be taxed, but once that wealth leaves this country, it is practically gone forever. Some

(Testimony of George B. Burnham.)

American citizens are 'ill-fed, ill-clothed, and ill-housed.' It does not help that situation to give our national resources to foreigners.

"The solution to the problem is to get American-owned corporations to lease the lands at Searles Lake and to help them with their finances to the end that they can produce more than the foreign-owned interests. In order that they can produce more they must be adequately financed and have a process that is cheaper than that now used by the American Potash & Chemical Corporation.

"Inasmuch as foreign-owned interests are driving out American competition by gradually getting more and more of the potash and borax of this country, it is to the Government's interest to help the American-owned corporations with their finances.

"As for a cheaper process, the solution at [412] Searles Lake lies in solar evaporation methods just as are now being carried on at the Dead Sea in Palestine. Of course, the solar process, as applied to the brines of Searles Lake, is different from that applied to the Dead Sea as they are different types of brines. The Burnham Chemical Co. made 1,400 tons of 99½% pure borax by solar evaporation at a cost of about 1¼c per pound. It has also carried out extensive research and large scale experiments in recovering potash, sodium carbonate, sodium sulphate and common salt by solar evaporation methods, with such a degree of success that we are convinced we can make these chemicals cheaper by

(Testimony of George B. Burnham.)

solar evaporation than by artificial evaporation of the brine. In fact, we have spent about \$1,000,000.00 in research, experimentation and development of the deposits at Searles Lake. There is no one in the United States that knows as much about solar evaporation processes at Searles Lake, and their tremendous possibilities for cheap recovery of the chemicals, as we do.

“We have certain equities in the Searles Lake deposit due to the fact that we have invested over \$1,000,000.00 in the development of the deposits. We have no money, but we have 7,000 American citizens in our company. They are people of small financial means. Many are destitute and have no income at all now. Some [413] have spent their savings in the development of Searles Lake. They are the kind of people who need the profits that can be derived from the wealth of Searles Lake.

“A great injustice has been done to these 7,000 American stockholders through the influence of foreign-owned potash and borax interests in the Halls of our Government, and also through their unfair price cutting the very month we started production. Therefore, it is only just that the Government now step to our aid and give us a new lease at Searles Lake; and loan to the Burnham Chemical Co. sufficient money to build up a plant as large, or larger, in capacity than that of the foreign-owned interests. With solar evaporation processes, which we believe are cheaper than artificial evaporation, we should be able to easily compete with the foreign-

(Testimony of George B. Burnham.)

owned potash and borax production, and gradually increase the capacity of our plant.

“Then the Government would protect its resources at Searles Lake which it desires to protect. It would derive the royalties it is entitled to. American citizens would be getting the profits. The three billion dollars (\$3,000,000,000.00) of increased wealth mentioned above would be gradually added to the wealth of American families instead of going to foreigners. That vast wealth can be taxed year after year and forever, for the [414] support and the building up of our Government, but if it is allowed to go to foreigners it is lost forever and can never be taxed thereafter. And lastly, but not least, if the Government would give the Burnham Chemical Co. a lease and financial aid it would prevent a foreign-owned monopoly of potash and borax in the United States, and give the American farmer cheaper potash.

“Therefore, on behalf of the 7,000 American citizens of the Burnham Chemical Co., I pray that you will not grant the American Potash & Chemical Co. leases on potash lands at Searles Lake, or grant leases to any other foreign-owned company. I also ask that you give the Burnham Chemical Co. a lease on lands formerly held by it at Searles Lake, or such other lands as you deem available; and that the Department of the Interior render us as much aid as possible in obtaining a Government loan to develop the lease. The spending of the money, of course will be under the supervision of the Government.

(Testimony of George B. Burnham.)

“It is not my own personal gain that I am thinking about in making these requests. I am willing to make any sacrifices which will aid in getting these requests granted. It is the benefits to the 7,000 American citizens that I am concerned with, and the resulting benefit to the Government. [415]

“Very respectfully,

GEORGE B. BURNHAM.”

Q. Now, Mr. Burnham, did you ever receive a reply to that letter? A. Yes, I did.

Q. When? A. In March, 1940.

Q. Have you got that? A. Yes?

Q. Will you be good enough to let me see it?

A. Yes, here it is.

Mr. Carr (Addressing the Jury): Thank you, ladies and gentlemen, for your patience.

Q. Now, I show you a letter dated March 5, 1940, addressed to yourself and headed “Information”, and signed by Fred W. Johnson, Commissioner. A. Yes.

Q. You received that in due course of mail from this party? A. Yes.

Mr. Carr: Do you want a copy, Mr. Harrison?

Mr. Harrison: Yes, please. If your Honor please, we object on the ground that it is incompetent, irrelevant and immaterial to any issue.

Mr. Carr: It is an acknowledgement of the letter and correspondence in reference to this matter, in reference to [416] the lease and in reference to the price cuts.

(Testimony of George B. Burnham.)

Mr. Harrison: It has no relation to the issue before the Jury, the knowledge of this witness as to a cause of action.

The Court: Let me read it.

Mr. Carr: Yes.

The Court: I don't see how it bears on the matter, Mr. Carr. Do you have some reason for putting it in?

Mr. Carr: May I state the purpose?

The Court: Yes.

Mr. Carr: It states that the American Potash & Chemical Company was legally entitled to the leases in question and that of course would disabuse any belief Mr. Burnham would have had in mind that the American Potash & Chemical Company was acting illegally or improperly in any way.

The Court: Is that the point under which you offer it?

Mr. Carr: Yes.

The Court: That is not what the letter says.

Mr. Carr: As I read it, it does.

The Court: I don't think so.

Mr. Harrison: I don't think so. It is after the period involved.

Mr. Carr: Of course, the law provides, as your Honor knows, that a company that was guilty of monopoly or violation of the Anti-Trust Laws could not receive a lease. [417]

The Court: The Secretary of the Interior was not passing on any Anti-Trust proposition. He was just stating that so far as this application was con-

(Testimony of George B. Burnham.)

cerned that the company had sufficient legal status to qualify them to take a lease. That is all he says.

Mr. Carr: It also shows as a result of that, that that letter disabused any belief, if any existed in Mr. Burnham's mind, that they were monopolizing.

The Court: This is in March of 1940.

Mr. Carr: Yes, but it shows——

The Court: I think it would unduly clutter up the record. The objection will be sustained. You may have it marked for identification.

Mr. Carr: May we insert a copy thereof in lieu of this?

The Court: Certainly.

(The document in question was thereupon marked Plaintiff's Exhibit 3 for Identification.)

Mr. Carr: Now, then, we will go on as fast as we can, your Honor.

The Court: Before you go on, Mr. Carr, we had better take the morning recess.

Ladies and gentlemen of the Jury, please bear in mind the admonition heretofore given to you by the Court.

(Recess.) [418]

Q. Mr. Burnham, you presented, at the request of counsel, a letter dated November 13, 1928, from Mr. Townsend to you; do you recall that?

A. Yes.

Q. In that letter it states: "I am now convinced that proceedings before the Federal Trade Commis-

(Testimony of George B. Burnham.)

sion would result in substantial benefits to those interested in the subject." What was the substantial benefits to which Mr. Townsend had reference?

Mr. Harrison: I suppose that means the witness' understanding.

Mr. Carr: Yes.

The Witness: Substantial benefits in increasing the price of borax.

Q. (By Mr. Carr): In what?

A. Substantial benefits to us resulting in the increased price of borax, that is, the Federal Trade Commission would investigate to see if there was any Antitrust Laws being violated.

Q. That was the main result? A. Yes.

Q. Mr. Townsend also said, "But I make this prediction with one condition annexed, and that is, the observance of the caution as I have recommended both in the memorandum and in this letter." Now, what was that caution that he recommended to you? [419]

A. He did not want us to discuss the matter because he wanted to make an investigation to see whether any Antitrust Laws were being violated. He wanted to get some evidence and information, and he did not want the competitors to know that we were trying to get any evidence. Furthermore, he did not think we should discuss the matter, talk about the matter on which we had no information yet, did not have any facts.

Q. At that time he told you he would endeavor to secure evidence?

(Testimony of George B. Burnham.)

Mr. Harrison: What is that?

Q. (By Mr. Carr): At that time did he tell you under his cautious warning for you to secure, if you could, further evidence? A. Yes, indeed.

Mr. Harrison: I object to that on the ground it is immaterial.

Mr. Carr: That explains what was meant by the word "caution" in the answer.

Mr. Harrison: I object to that on the ground it is immaterial and leading.

The Court: I will allow it to stand.

Q. (By Mr. Carr): At that time was the Pittman resolution pending before Congress?

A. No.

Q. When did that Pittman resolution come in?

A. That was passed by Congress in 1936.

Q. This was 1928? A. Yes.

Mr. Carr: Was the letter to Mr. Zabriskie of January 15, 1929, Defendants' Exhibit O, read?

Mr. Harrison: I read part of it.

Mr. Carr: May we see Defendants' Exhibit O? This was the letter, ladies and gentlemen, dated January 15, 1929.

Mr. Harrison: Mr. Carr, before you read that may I look at it a moment, please?

Mr. Carr: Yes, certainly.

Mr. Harrison: I have no particular objection to this letter, if the Court please, but is a letter of four pages and we will object in future if matters immaterial to the dispute are read.

(Testimony of George B. Burnham.)

Mr. Carr: It is your own exhibit. You certainly cannot object to us reading your own exhibit.

Mr. Harrison: It has nothing to do with the question which is the only question before this jury——

Mr. Carr: Then why did you put it in?

Mr. Harrison (Continuing): ——as to whether this plaintiff corporation knew or had cause to believe at this time whether or not the Antitrust Laws had been violated to their damage. We submit a lot of time can be wasted in this respect.

The Court: Mr. Harrison, the letter is an exhibit, and [421] if counsel wants to read it, I am not going to cut him off from doing that. He has to decide whether it is of any importance to his own case.

Mr. Carr: And believe me I won't read anything that I do not think is important.

“January 15, 1929.

“Pacific Coast Borax Company,
100 William Street,
New York City, N. Y.

Attention Mr. C. B. Zabriskie

Dear Sirs:

Pursuant to our conversation last month concerning our patent situation at Searles Lake, I have discussed the matter with our directors, and sub-

(Testimony of George B. Burnham.)

mit to you the following statement of our position concerning the matter:

1. For a long time we received information to the effect that our patent rights, as to borax, were being violated by the operations of the American Potash and Chemical Corporation. After a careful investigation and consideration of the matter, we became convinced that the American Potash and Chemical Corporation was, and for a long time had been, engaged in flagrant violations of such patent rights; whereupon, we served upon them a formal notice of infringement on October 31, 1927.

2. In the meantime, the American Potash and Chemical Corporation has engaged in the persistent and flagrant [422] price-war, as to borax, reducing the price to \$50.00 per ton or less, delivered anywhere in the United States. We are reliably informed that the prices quoted by this company in the present month and for several months last past, are below its actual cost of producing borax, if such production-cost be accurately and properly computed; and we are further reliably informed that the specific purpose of this price-war is to destroy competition as to borax.

3. The American Potash and Chemical Corporation could not carry on this price-war except for the fact that they are illegally employing the economical advantages of the patent rights of the Burnham Chemical Company. In other words: They are illegally using the patent rights of the Burnham Chemical Company for the specific purpose of manufacturing borax at a low cost, and then selling

(Testimony of George B. Burnham.)

minimum annual payment to be made to us for license as above provided, should be increased to \$200,000; [427]

3. The Burnham Chemical Company to definitely obligate itself not to license the processes or any of them to anyone else,—also to defend such processes against all infringers, the expenses of any and all such suits to be borne by the Burnham Chemical Company.

4. In the event that the Burnham Chemical Company should lose its suit against the American Potash and Chemical Corporation, or that in such suit or in any other proceeding the patents and patent rights of the Burnham Chemical Company should be held to be invalid, then the Pacific Coast Borax Company to have the right to cancel the above mentioned agreement for license; provided, however, that any payments theretofore made shall be retained by the Burnham Chemical Company.

5. It being understood, of course, that Pacific Coast Borax Company shall not have the right to sub-license such patent rights, or any thereof, without the consent of the Burnham Chemical Company.

We have refrained from any attempt to set forth the many favorable arguments which should appeal to you and your company, for the obvious reason, above stated, that even our conception of them would appear small to you and your company.

However, I will venture the prediction that the very institution of a suit by us, as above proposed, will result [428] in an immediate increase in the

(Testimony of George B. Burnham.)

price of borax of not less than \$10.00 per ton, and that this increase alone will much more than offset the cost to your company of such benefits, under the above propositions. Should you desire to have any demonstration concerning our patents, or concerning the alleged infringement thereof, we will be glad to extend to you every possible assistance in the matter; if you desire, we will be glad to co-operate with your patent attorney, and furnish him such information as he may desire.

The foregoing proposition has been prepared after a great deal of thought upon the subject. It is hoped that it may appeal to you as a fair and desirable method of co-operation between our two companies.

Yours very truly,

BURNHAM CHEMICAL
COMPANY,

G. B. BURNHAM,
President."

Ladies and gentlemen, I ask you that you note particularly the date, January 15, 1929, and that the letter is written to Pacific Coast Borax Company.

Q. Mr. Burnham, did you have a reply to that letter?

A. I could not find a reply in our file, but I talked to Mr. Zabriskie.

Q. Concerning the letter?

A. Concerning the letter, about two and a half months after [429] January 15th.

(Testimony of George B. Burnham.)

Q. And where did you talk to him?

A. In New York City.

Q. And what was that conversation?

Mr. Harrison: Can you fix that any more accurately?

The Witness: On or about March, 27, 1929.

Mr. Harrison: Can you fix the time any more accurately?

The Witness: A. On or about March 27, 1929.

Q. (By Mr. Carr): Have you any memorandum of that conversation?

A. I have a very brief memorandum which recalled to me the conversation.

Q. When did you discover that memorandum in your book?

A. I just discovered it recently after I had made my deposition, just two or three days before this trial started to discovered this memorandum.

Q. Now, will you refer to that memorandum, please, and read it?

A. At the top of it it is dated "March 27, 1929," and it is the preliminary draft of the telegram to the Burnham Chemical Company from myself in New York City. And at the end of the telegram I add these words——

Mr. Harrison: May I see that before you read it, Mr. Burnham?

Mr. Carr: Yes.

The Witness: Yes.

Mr. Harrison: Show me where it is.

A. Right there.

(Testimony of George B. Burnham.)

Q. (By Mr. Carr): Did you mark that, Mr. Burnham? A. It is not marked, no.

Q. I thought you just marked it. Oh, you did it with your finger? [430]

A. Yes, just pointing.

Q. All right.

A. At the end of the telegram it says "Zabriskie not yet heard from London in answer our letter because Baker sick."

Q. Well, what was your full conversation with Mr. Zabriskie at that time?

A. Well, I was a little provoked——

The Court: He just wants you to tell the conversation.

A. Oh, yes, the conversation: Zabriskie and I talked again about the patent situation and that letter of January 15. Mr. Zabriskie said that they had a lot of patents of their own. He said the Solvay Process Company had some patents and the Solvay process Company was associated with them. And it might be to their better interest to bring a patent suit against the American Potash & Chemical Company, themselves. However, he had to wait until he heard from Baker on the matter.

Q. (By Mr. Carr): And that was all, practically, the substance of the conversation, is that correct, at that time?

A. Yes, as near as I can remember; but this memorandum recalled that visit I had with Mr. Zabriskie.

(Testimony of George B. Burnham.)

Mr. Carr: Withdraw that question. [435]

Q. After your conversation with Mr. Zabriskie, what, if anything, happened as to your thoughts on the situation?

A. Well, I was satisfied that Zabriskie was not cooperating with the American Potash & Chemical Company. They were really thinking about bringing a suit, themselves, against the American Potash & Chemical.

Q. Mr. Burnham, please refer to your diary there of the record of your conversation with Mr. Emlaw on May 17, 1929: Have you got that?

A. Yes.

Q. Will you explain to the jury how it is that note is not all on one page?

A. These notes are not necessarily put down the very day I have a conversation; perhaps the next day or some other time, a couple of days later, when I have the time or the opportunity. After I had put Mr. Zabriskie's conversation down and after I put the conversation with Mr. Emlaw on the other page down I left—I was reviewing Mr. Zabriskie's discussion, possibly the second day, and I recall that he said that "Trona was not selling borax." I mean, "Trona has to sell. Can't help it." I thought that coincided so much with what Emlaw had said that I wrote right across from that on the other page the statement which Mr. Emlaw said, "Emlaw says not selling. Nothing in it. Would sell if he could get an offer."

Q. In other words, you had a vacant space on

(Testimony of George B. Burnham.)

the preceding page [436] and you used that instead of turning the page over, is that correct?

A. That is correct.

Mr. Harrison: I would like to have the witness testify, Mr. Carr.

Mr. Carr: I am asking him if that is the fact.

Q. Will you explain why you did not follow immediately after your note as to the Emlaw entry?

A. Because I didn't put down all the notes I had with Emlaw at that time when I wrote it down. Later on, perhaps the next day, I was thinking of further conversation with Emlaw and I happened to have this page down, so I put this further conversation down on this page that was available.

Q. When that additional thought occurred to you was there any space on the same page?

A. Yes, there was room.

Q. I mean, right below the Emlaw notes.

A. Yes, there was room below. I could have put it there if I thought to turn the page over.

Q. But you went over to the other page to fill in what blank was there, is that correct?

A. I wrote on the other page because that was right opposite that talk with Zabriskie on that subject.

Mr. Carr: Shall I go ahead with a new subject, your Honor? [437]

The Court: Perhaps we might take the recess now.

Ladies and gentlemen of the jury, you are excused until two o'clock, when we will resume the trial of

the case. Please remember the admonition heretofore given to you by the court.

(A recess was taken until two o'clock p.m.)

Afternoon Session, Wednesday, April 2, 1947, 2 p.m.

GEORGE B. BURNHAM

recalled.

Redirect Examination

(Resumed)

By Mr. Carr:

Q. Mr. Burnham, in the Fraud Order case up there in Nevada, the testimony has referred to a temporary injunction that was issued, is that correct? A. Yes.

Mr. Carr: We offer in evidence, if your Honor please, the certified copy of the temporary injunction.

(The document was marked Plaintiff's Exhibit 4 in evidence.)

Mr. Carr: I will read this, if your Honor please:

“In the District Court of the United States
For the District of Nevada

Burnham Chemical Company, George B. Burnham, and V. E. Scott, Plaintiff, vs. George F. Smith, Postmaster of the United States in charge of the Post Office at Reno, Nevada. c

Temporary Injunction

“The above-entitled matter having duly come on to be heard before the above-named court,

(Testimony of George B. Burnham.)

on January 15, 16, and 17, 1930, upon plaintiffs' motion for a temporary [438] injunction, plaintiffs appearing by their attorneys, B. D. Townsend and E. F. Lunsford, and defendant appearing by H. H. Atkinson, United States Attorney;

"And said matter having been argued on behalf of the parties, respectively, and having been duly submitted to the court;

"And the court having duly considered such arguments, together with all papers, records, and files in such cause, including all papers urged in support of or against such motion;

"And the court being duly and fully advised in the premises, and due cause appearing therefor;

"Now, Therefore:

"It Is Hereby Ordered, Adjudged, And Decreed, that during the pendency of this action, or until the further order of this court, the defendant be, and hereby is, enjoined and restrained from, in any manner, obeying or enforcing that certain Post Office Fraud Order (or any part thereof), issued by the Postmaster General of the United States against the 'Burnham Chemical Company and G. B. Burnham, President,' (the later being George B. Burnham, the plaintiff herein), bearing date June 20, 1925, addressed to the Postmaster at Reno, Nevada, and being identified as 'Order No.

(Testimony of George B. Burnham.)

the borax at such a low price as to drive out competitors, including the Burnham Chemical Company, which is the owner of the patent rights illegally employed for that purpose. We are advised by our attorneys that, under these facts, the American Potash and Chemical Corporation is engaged in an "unfair method of competition", within the provisions of the Federal Trade Commission Act, and allied acts.

4. There are two obvious remedies available to us: (a) proceedings before the Federal Trade Commission, and (b) private suit by the Burnham Chemical Company. The former [423] will be conducted by the government, and with little or no control by the complainant or any of the other parties interested; and there is danger that there would be considerable delay, in view of the experience in prior cases before the Federal Trade Commission. Moreover, the Burnham Chemical Company would have no opportunity to enforce its patent rights in any proceedings before the Federal Trade Commission. Therefore, we are advised that we will secure quicker and more complete relief in a private suit by our company, than by any proceeding before the Federal Trade Commission.

5. A victory by our company will inure to the benefit of all parties engaged in the manufacture and sale of borax. In fact, so far as the immediate effects are concerned, the other parties engaged in the borax trade will be benefitted much more than our company, for the reason that the amount of their trade is many times greater than ours. More-

(Testimony of George B. Burnham.)

over, these same parties are deeply interested in any litigation of this kind instituted by the Burnham Chemical Company, for the reason that such suit appears to be the only practical method of stopping this unfair and illegal price-war. Thus, there appear to be moral reasons, although no legal reasons, why those interested in the borax trade should extend to the Burnham Chemical Company financial backing in proportion to the benefits [424] which it will receive, for use in conducting any such legal fight; and, in consideration thereof, that the Burnham Chemical Company should assume such obligations as would guarantee the realization of such benefits.

6. The Burnham Chemical Company has a very limited financial backing and has not yet participated to any great extent in the borax trade. The others engaged in the borax trade and particularly the Pacific Coast Borax Company have ample financial backing and have participated and are now participating to a very large extent in the borax trade. At the same time, the Pacific Coast Borax Company will share in the benefits of any victory which may be won by the Burnham Chemical Company, a great many times more than the Burnham Chemical Company itself, computed upon the basis of their present production respectively. The officers of the Pacific Coast Borax Company will appreciate this even better than anyone else; but, in view of the present production of the Pacific Coast Borax Company, if the present price-war should

(Testimony of George B. Burnham.)

cease, and a normal price for borax should be resumed, the benefits accruing to the Pacific Coast Borax Company would undoubtedly be several million dollars per year.

A consideration of the foregoing situation prompted my informal discussion of the subject with you last month. Further discussion with our directors since my return, [425] has developed the following suggestions which are submitted for your consideration:

1. The Pacific Coast Borax Company to pay to Burnham Chemical Company the sum of \$50,000.00 to be used by it in prosecuting the litigation hereinafter mentioned.

2. The Burnham Chemical Company to institute appropriate suit or suits against the American Potash and Chemical Corporation to enforce its patent rights, and enjoin further infringement by the American Potash and Chemical Corporation, and for such other relief as may be available to the Burnham Chemical Company; it being understood that all financial and other direct benefits shall accrue to the Burnham Chemical Company.

The foregoing suggestion is complete in itself. However, it may be subjected to the following objection: It may be feared that even if the Burnham Chemical Company should be successful in its suit against the American Potash and Chemical Corporation, it might enter into some form of a compromise, which would include the licensing of the American Potash and Chemical Corporation to use

(Testimony of George B. Burnham.)

such patent rights, in which event no benefits would accrue to the Pacific Coast Borax Company or others similarly situated; on the contrary, the American Potash and Chemical Corporation would be put in a position to maintain its prior conduct if it so desired, as licensee [426] of such patents.

Heretofore the Burnham Chemical Company has maintained a definite policy not to sell or otherwise dispose of any of its patent rights. However, the present situation is of vital importance to all of us, and we are willing to do anything reasonable to bring about co-operative efforts to secure mutual relief. Therefore, we submit to you the following further suggestion:

1. The Burnham Chemical Company to license to you (and no one else) the use of its borax process covered by U. S. Patents No. 1,328,614, No. 1,370,278, No. 1,424,447, No. 1,476,890, No. 1,487,046 and No. 1,571,002 (being all of our patents pertaining to borax) for the sum of \$100,000.00 per year payable in advance, together with a royalty of \$3.00 per ton on all borax which you may produce through the use of the processes covered by such inventions.

(The use of these processes would be indispensable to you, in our opinion, if you should ever resume operations at Borosolvay.)

2. In the event that we should be successful in our suit against the American Potash and Chemical Corporation, or in any other suit whereby we should definitely establish the validity of our patents, the

(Testimony of George B. Burnham.)

Q. Now, to clean up this matter about the memorandum: When you were requested to look through your book at the time of the taking of your deposition did you hunt for all of these memos of conversation with Mr. Zabriskie?

A. Yes, I had a great many books, and I hunted through them [431] for all conversations with Zabriskie, but this one was overlooked.

Q. And the only entry or reference to that particular matter is at the end of the note, is it not?

A. Yes.

Q. And there is no heading at the top that it was a conversation with Zabriskie?

A. There was nothing to indicate at a quick glance to indicate that it was a conversation with Zabriskie.

Q. And so, as I understand it, it was two or three days before this trial when you were going through your books that you happened to come on that situation, is that correct?

A. Yes, that is it.

Q. Mr. Burnham, did you ever receive—well, I think you have answered that. Now, on the stand here the other day you were asked this question:

“Q. Did the fact that Zabriskie wouldn’t help you, give you an added belief or suspicion that his company was cooperating with the American Potash & Chemical Company to cut prices to drive you out of business?”

(Testimony of George B. Burnham.)

Your answer was:

“A. No, it didn’t.”

Then Mr. Harrison asked you to refer to your deposition in which these questions were asked of you and you gave the following answers: [432]

“Q. I will ask you to turn to the deposition, at page 105, if your will, please—page 105, line 11, and I will ask you if you testified as follows:

Mr. Carr: Page 105, line 11?

Mr. Harrison: Q. Yes, have you that?

A. 105, line 11?

Q. Yes. I will ask you whether you testified at your deposition that was taken within the last month as follows:

‘Q. Then when Mr. Zabriskie refused to advance the money to assist you in bringing a patent suit against the American Potash & Chemical Company so that you could get the price up, you attached significance to that, did you?’

Mr. Carr: What page and what line?

Mr. Harrison: Line 11.

Mr. Carr: Oh, pardon me.

Mr. Harrison: I will re-read the question:

‘Q. Then, when Mr. Zabriskie refused to advance the money to assist you in bringing a patent suit against the American Potash & Chemical Corporation so that you could get the price up, you attached significance to that, did you?’

(Testimony of George B. Burnham.)

A. Well, I felt very certain that the American Potash was infringing our patents and the very fact that Zabriskie, who wouldn't cooperate in any way to help us, and incidentally [433] helped himself for supporting our infringement suit against the American Potash & Chemical Company, the very fact that he wouldn't cooperate gave me added belief or suspicion that he was cooperating with the American Potash & Chemical Company and cooperating with them to cut the price in order to drive us out of business.'

Q. Did you so testify?

A. I did, but I have been thinking about that since I testified to that and I have been wondering a little bit."

Now, Mr. Burnham, can you explain the apparent inconsistency of those two answers.

A. In my deposition when I was asked that I was thinking of the period of time shortly following the letter we wrote on January 15. For two and a half months there we hadn't heard from Zabriskie, and I was a little provoked and a little bit suspicious that maybe he was cooperating with the American Potash and Chemical Company, but when that similar question was asked me here on the stand the other day I was thinking of that period of time after my talk with Zabriskie on March 27, 1929, and my talk with Zabriskie also on May 17, 1929, and this picture existed then in that earlier period of time.

(Testimony of George B. Burnham.)

Q. So that in the period of time you referred to in your deposition, that was immediately after, or shortly after you had written this letter to Pacific Coast Borax Company, is that correct?

A. Yes. [434]

Q. And before you had your conversation with Mr. Zabriskie which you just mentioned, and as to which you read a memorandum from your book.

A. Yes. When I was on the witness stand I was thinking of that period of time just after I had that other conversation with Mr. Zabriskie in March of 1929.

The Court: Mr. Carr, I will interrupt the proceedings for a moment. I want to take the report of the grand jury.

Mr. Carr: Certainly, your Honor.

(Recess.)

Mr. Carr: Shall I proceed?

The Court: Yes.

Q. (By Mr. Carr): Mr. Burnham, after your conversation with Mr. Zabriskie in March, were any suspicions you might have had as to the good faith of the Pacific Coast Borax Company then allayed?

Mr. Harrison: I object to that question, if your Honor please——

The Court: I did not hear the question. Will you read that, please?

(Question read.)

Mr. Harrison: I object to that; it is leading.

The Court: Yes, it is leading. You can ask him what happened.

(Testimony of George B. Burnham.)

3006'; and from in any manner refusing or failing to deliver properly all letters and other [439] mail matter (and each and every part thereof) addressed to the Burnham Chemical Company and 'G. B. Burnham, President' and George B. Burnham, plaintiff herein (and being the 'G. B. Burnham, President' mentioned in such fraud order) or failing to pay each and all postal money orders in terms payable to the Burnham Chemical Company, or to 'G. B. Burnham, President,' or to George B. Burnham, plaintiff herein, (and being the 'G. B. Burnham, President' mentioned in such fraud order); and from, in any manner, denying or interfering with the full enjoyment by the Burnham Chemical Company and 'G. B. Burnham, President,' and George B. Burnham, Plaintiff herein, (and being the 'G. B. Burnham, President' mentioned in such fraud order), and each of them, of each and all general postal rights and privileges provided by the General Postal Laws of the United States.

Dated: Carson City, Nevada, February 3, 1930.

/s/ FRANK H. NORCROSS,
District Judge."

Q. (By Mr. Carr): Now, Mr. Burnham, how long did that temporary restraining order remain in force and effect?

A. It remained in force and effect until 1935. We continued to get our mail.

(Testimony of George B. Burnham.)

Q. Then what happened, if anything?

A. Then the case was dismissed by the court for lack of prosecution on our part because we had planned to make the temporary [440] injunction permanent, but because of the sickness of Mr. Townsend that was never accomplished, and therefore, for lack of prosecution on our part, the case was dismissed by the court.

Q. Did you have any notice of such intention to dismiss that case? A. No, I did not.

Mr. Harrison: I object to that on the ground it is incompetent, irrelevant, and immaterial, if the Court please.

Mr. Carr: It is the history of the case. It is proper. It is a history of the whole situation.

Mr. Harrison: It does not bear on the issue of knowledge.

The Court: I don't see what notice has to do with it. I will sustain the objection.

Mr. Carr: It shows they did not voluntarily consent to it. Afterwards the Postoffice order was reinstated, and we want to show the time that elapsed between the two.

Mr. Harrison: The testimony already shows it was dismissed for lack of prosecution.

The Court: Yes.

Q. (By Mr. Carr): I believe the fraud order was thereafter reinstated, was it not?

A. Not until two years later.

Q. Your answer is "Yes" to that?

A. Yes. [441]

(Testimony of George B. Burnham.)

Q. When was it reinstated?

A. Two years later, in September, 1937. We continued to get our mail just the same.

Q. You continued to get your mail just the same after the order was reinstated?

A. No, after the case was dismissed we continued to get our mail just the same.

Q. And the fraud order was reinstated?

A. Yes.

Q. Was there any hearing in the Post Office Department before the reinstatement of that order?

A. No.

Mr. Harrison: That is objected to as incompetent, immaterial and irrelevant. I did not have an opportunity to object before the answer went in.

Mr. Carr: Then I stipulate the answer may go out for the purpose of your objection going in, Mr. Harrison. Now, your Honor, that is a history to show without any knowledge or consent on their part this order, without any notice to them, without giving them a chance——

The Court: We have enough to do in deciding the issue at hand without deciding whether or not the Post Office Fraud Order was a proper order or not.

Mr. Carr: Very well, your Honor.

The Court: I will sustain the objection.

Q. (By Mr. Carr): There has been some testimony, Mr. Burnham, [442] as to the resolution introduced by Senator Pittman in the Senate, is that correct? A. Yes.

(Testimony of George B. Burnham.)

Q. Have you a copy of that resolution?

A. Yes.

Q. Will you produce it, please? While you are producing it, let me ask you, how did you get that? How did you receive that?

A. I received it from either Senator Pittman or his secretary; I don't remember exactly which one.

Q. And when, do you remember?

A. In 1936.

Q. Do you remember what month?

A. It was in the summer of 1936, I believe.

Mr. Carr: We have, may it please your Honor, this resolution, and after counsel has had an opportunity to read it and enjoy it, we will read it.

Mr. Harrison: If your Honor please, we object to this as being immaterial and irrelevant and incompetent, and no foundation laid.

Mr. Carr: It has already been referred to in the cross-examination. You brought that out.

The Court: Of course, I don't know what the relevancy of it is. That would be saying if a man visited this witness the day after Thanksgiving that you would have to enter the [443] Thanksgiving Proclamation. It may be that this is relevant, I don't know. But I must confess after reading it that I don't know what the relevancy of it is.

Mr. Carr: It attempts to bear out the plaintiff's testimony previously given that he knew nothing of these alleged conspiracies or these acts of these defendants, I mean, as to constitute the conspiracy, and he was still endeavoring to get help from the

(Testimony of George B. Burnham.)

Government as to the ascertainment of the answer as to whether or not these defendants were violating the Antitrust Laws.

The Court: The fact that a Senator of the United States introduced a resolution in Congress in 1936 reciting the conditions in the borax industry and providing for the appointment of a committee to investigate them in 1936 would bear how on the relationship of the plaintiff in this case?

Mr. Carr: That goes to substantiate his testimony that he knew nothing about any such conspiracy in existence and that the letters back and forth between him and Senator Pittman show that Mr. Burnham *was* submitted to the Government all of the facts of his situation as he knew them to be.

The Court: I don't want to suggest to you, Mr. Carr, how you should try your case, but if you insist on urging this resolution, that it be introduced in evidence, I will overrule the defendants' objection, but how it serves your cause beneficially I cannot possibly see. If you say that the plaintiff [444] is the one who urged that this resolution be presented in the Senate of the United States, how it serves your cause I don't know, but I am not going to stop you from putting in anything you want.

Mr. Carr: It goes to the intent of the plaintiff and his endeavor to prove the facts.

The Court: It would certainly be more affirmative proof of knowledge than absence of knowledge.

(Testimony of George B. Burnham.)

Mr. Carr: He is trying to find out the facts and why he didn't know them in his letter——

The Court: If you insist on this resolution going in in spite of what the court has said I will admit it.

Mr. Carr: Thank you, your Honor; and without intending to be bullheaded, frankly, I think it would fit into our theory.

Mr. Harrison: Is it your claim that this witness instigated this resolution?

Mr. Carr: No, he is not a Congressman, but in his letter to the Department of Justice——

The Court: As I remember his letters did indicate he was urging a resolution be made.

Mr. Carr: Yes.

The Court: Now, you want to introduce the resolution authorizing the investigation?

Mr. Carr: Yes, but we don't contend that Mr. Burnham brought that about. We don't know. His inquiries may have [445] helped, but we cannot say he was actually the one who persuaded Senator Pittman to introduce that resolution.

The Court: Very well.

(The resolution was received in evidence and marked Plaintiff's Exhibit 5.)

The Court: Do you wish to read the whole resolution, or can you not state the substance of it to the jury?

Mr. Carr: Yes, that is simply a resolution introduced, ladies and gentlemen, by which a committee was appointed to investigate, and I will read the

(Testimony of George B. Burnham.)

last portion of it. There is a long preamble to the resolution. (Addressing Mr. Harrison): You can read over my shoulder.

Mr. Harrison: Yes, and that will save a little time.

Mr. Carr (Reading):

“Whereas dependence on foreign sources for an adequate supply of potash was brought forcibly to our attention when, in May, 1910, a potash law was enacted in Germany which required the American consumer to pay \$32.98—” and so forth, and

“Whereas since 1910 the Congress has appropriated in excess of \$3,000,000 to find and develop domestic sources of potash and methods for the extraction and use thereof; and:

“Whereas two domestic sources have been developed, namely, the brines of Searles Lake, San Bernardino County, [446] California, and the deep mines near Carlsbad—” and so forth, and:

“Whereas notwithstanding the withdrawal of the Searles Lake area in 1913, and the establishment of a leasing policy thereon by the Potash Act of 1917, a foreign-owned company received patents in 1918, 1919, and 1920 covering placer claims—” and so forth, and:

“Whereas, following development of additional sources of potash in Spain—” and so forth, and:

(Testimony of George B. Burnham.)

“Whereas it appears imperative to adopt some wise policy of conservation of natural mineral resources to minimize over-production and attendant waste—” and so forth,

“Therefore Be It

“Resolved, That the Committee on Public Lands and Surveys be, and it is hereby, authorized and directed to institute and conduct a thorough investigation of all phases of the subject-matter hereof.

“For the purposes of this resolution the said committee, or any subcommittee thereof, is authorized to hold hearings; to sit and act at such times and places during the sessions and recesses of the Congress until the final report is submitted; to require by subpoena or otherwise the attendance of such witnesses, and the production of such books, papers and documents; to administer such oaths; to [447] take such testimony; and to make such expenditures as it deems advisable.”

And then:

“The Committee shall report at the next Session of Congress the results of its investigation, together with its recommendations, if any, for necessary legislation.”

Q. Now, Mr. Burnham, that was introduced in April, 1936? A. Yes.

Q. And you had, did you not, communications from Senator Pittman in reference to the investigation they were making? A. Yes.

(Testimony of George B. Burnham.)

Q. Over what period of years did those investigations exist or continue?

A. About four years.

Q. Senator Pittman finally died in what year?

A. Senator Pittman finally died in November of 1940.

Q. Had the investigation been concluded at that time? A. No, it had not.

Q. Do you know what became of the investigation?

Mr. Harrison: I object to that as immaterial.

Mr. Carr: All right, we withdraw that question.

Did you read that letter to Senator Pittman, Mr. Harrison?

Mr. Harrison: I read parts of it, Mr. Carr.

Mr. Carr: May I see Defendants' Exhibit T? I will try, [448] ladies and gentlemen of the jury, not to burden you with this if I find it only contains a brief statement.

The Court: This is the reply of Mr. Burnham to Senator Pittman's letter?

Mr. Carr: Yes, request, your Honor. May I look at this a moment to see? Maybe I can avoid some of this that has been read.

Q. Briefly, Senator Pittman asked you to write a full statement of the situation concerning the Burnham Chemical Company, did he?

A. Yes.

Q. And you did that in your letter of October 20, 1936? A. Yes.

(Testimony of George B. Burnham.)

Q. In that letter you practically set forth for all purposes here today the same contents that were in the letter that you wrote to the Secretary of the Interior?

A. Very much the same. It was the history of the Burnham Chemical Company.

Q. Now, was there anything definitely done, do you know, under that to carry on such investigation under that resolution?

Mr. Harrison: Objected to on the ground it is wholly immaterial what the committee did.

Q. (By Mr. Carr): Do you know, Mr. Burnham, how far the investigation under that particular resolution had proceeded at the time of Senator Pittman's death? [449]

Mr. Harrison: That is objected to as immaterial.

The Court: I think that calls for the opinion of the witness, too.

Mr. Carr: But the letter will be in for all purposes, will it not?

Mr. Harrison: The letter has been introduced in evidence.

Q. (By Mr. Carr): Mr. Burnham, have you a copy of the letter to the Stockholders, of September 24, 1935? A. Yes.

Q. May I see that, please? A. Yes.

Q. Now, you handed me, Mr. Burnham, a letter directed to the stockholders of the Burnham Chemical Company, one of those printed letters dated September 24, 1935, is that correct? A. Yes.

Q. And with a facsimile of your signature?

A. That is right.

(Testimony of George B. Burnham.)

Mr. Harrison: We object to it, if your Honor please. This is offered, Mr. Carr tells me, for the purpose of a particular statement here, and to that statement we object on the ground it is self-serving and not admissible.

The Court: Is it marked?

Mr. Carr: Yes, your Honor, and it is simply in substantiation of his testimony as to his belief after his conversaton with Mr. Zabriskie.

Mr. Harrison: We respectfully submit that a belief cannot be proved, if your Honor please, by a statement to a third person at the time. The ultimate question is what he knew and what he told us.

Mr. Carr: That is exactly what he believed. That is exactly what this does. It shows what he believed in 1936.

Mr. Harrison: We submit his statement to a third person as to what he believed at that time is not a competent proof of his belief.

The Court: I think the rule is very clear, Mr. Carr, that counsel can on cross-examination, bring out any statement [450] that a party may have made, but the party on whom rests the burden of going forward cannot produce self-serving declarations to prove his case.

Mr. Carr: That is true as a general rule, but this was written long prior to this litigation, and was written some years after.

The Court: If you wanted to use it perhaps as a memorandum to refresh the witness' recollection as to something he did at the time, I do not know

(Testimony of George B. Burnham.)

whether that would be possible to cover it; but the statement itself is not admissible and I would have to sustain an objection to it on that ground.

Q. (By Mr. Carr): Mr. Burnham, along about September 24, 1935, did you make any statement to your stockholders about the reasons for the drastic price cuts in borax?

Mr. Harrison: That is objected to as immaterial and calling for hearsay testimony.

Mr. Carr: No, that is not hearsay; that is a direct statement along his Honor's suggestion.

The Court: All I said, Mr. Carr, was it may be that some document that the witness himself made up might refresh his recollection as to something that he did at the time.

Mr. Carr: I won't even refer to this document.

Q. Mr. Burnham, how long, may I ask, did you continue to believe the statements made to you by Mr. Zabriskie and Mr. Emlaw as to the reason of the price cut in 1928? [451]

Mr. Harrison: That is objected to on the ground it has already been covered on direct.

Mr. Carr: No, excuse me, on direct, no.

Mr. Harrison: That precise question.

Mr. Carr: Oh, no, we never went into those price cuts on direct. You brought it out on cross-examination.

The Court: He said in his direct examination that during the entire period specified in the order covering the special issue in this case he had no knowledge or reason to believe his business had been damaged.

(Testimony of George B. Burnham.)

Mr. Harrison: Also I think he testified on direct in answer to Mr. Carr's question that he believed the statements of these gentlemen all through the period.

Mr. Carr: I asked him how long did he continue to believe them.

The Court: If the objection is merely on the ground that he has answered it once before, in order that there may be no question about it, I will overrule the objection.

The Witness: A. I believed it until September, 1944, when the——

Mr. Harrison: Never mind, if you will excuse me, if your Honor please.

The Court: Yes, I think that is the same statement the witness made before. The same objection was made then.

Q. (By Mr. Carr): Now, Mr. Burnham, I am going to read you [452] some portions of your complaint on file herein, beginning at Page 25, Line 25, headed, "The 1929 Agreement".

Mr. Harrison: If your Honor please, we object to reading the complaint now on the same ground on which we objected to it at the opening of the trial. This allegation to which Counsel now refers goes to the merits of the case and not to the knowledge of the plaintiff.

Mr. Carr: Why, yes, it goes to the merits of the case exactly, and that is the basis on which this complaint is brought. The complaint is not brought, if it please your Honor, for conspiracies involving

(Testimony of George B. Burnham.)

the overt acts; all the testimony we have had to date has been involving conspiracies around the overt acts. Now, there has been no testimony whatsoever with respect to the basic conspiracy on which this action is filed and commenced. There is nothing in the complaint as to anything involving the overt acts testified to this morning except previously——

The Court: I am very much in the dark as to what sort of question you are going to put to the witness. It is very difficult for me to rule on a question when I do not know what you are going to ask.

Mr. Carr: Independent of that, your Honor, we have a right to read the portions of the complaint on file herein, we submit.

The Court: That is not part of the interrogation of the [453] witness, unless you are going to ask him some questions.

Mr. Carr: I am going to ask him question on that.

The Court: What is the question you are going to ask?

Mr. Carr: I am going to ask him, When did he first discover or know about that 1929 agreement. That is the basis of our action here.

The Court: You mean you want to ask the witness when he first discovered that there was a conspiracy between the defendants which resulted in injury to his business?

Mr. Carr: Yes.

(Testimony of George B. Burnham.)

The Court: You have already asked him that and he said he did not discover it until 1944.

Mr. Carr: No, your Honor, I want to ask him specifically all of the questions I asked him before. These were the questions, and they were right along the line of your Honor's pre-trial order and did not involve this situation. The questions that I asked Mr. Burnham——

The Court: No, I am not talking about what is in the transcript. I am talking about the question you asked him a moment or two ago, and he answered the first time he had any knowledge of this conspiracy was in September, 1944.

Mr. Carr: No, I asked him for how long did he continue to believe Zabriskie.

The Court: Oh, I see.

Mr. Harrison: He also testified on direct as to when he [454] first learned about the alleged conspiracy.

The Court: Why don't you ask him, if there is any doubt about it, Mr. Carr, without reading the allegations of the complaint, when he first obtained any knowledge of the conspiracy which he charges in the complaint here? That covers what you want without reading the complaint.

Mr. Carr: I would like, your Honor, to read the complaint, the conspiracy charged in the complaint, because that is the basis of our action, not these overt acts to which all of the testimony has tended.

The Court: Would you permit me to ask a question and see if it will cover what you have in mind?

Mr. Carr: Yes.

(Testimony of George B. Burnham.)

The Court: I understand that you have charged in the complaint in this case that the defendants in 1929 entered into a conspiracy and that the result of that was the plaintiff was driven out of business. Now, what you want to know of this witness is when did this witness first discover the existence of such a conspiracy, is that right?

Mr. Carr: Yes, your Honor.

The Court: All right. I will ask him that question. Do you wish to object to that?

Mr. Harrison: Only to this extent, your Honor, that I suggest that the complaint also alleges a conspiracy in 1925 with respect to the Post Office fraud order and in 1928 with [455] respect to the price cut.

Mr. Carr: No, your Honor.

The Court: I will put the question this way and then either counsel may object to it:

Q. When did you first obtain knowledge of any of the conspiracies that you have alleged in the complaint?

Mr. Carr: No, that is different, your Honor, because there are different conspiracies. I want to confine his testimony at this time. Counsel can bring out on cross, if he wants to, that matter.

The Court: All right. I will reframe the question again:

Q. When did you first obtain any knowledge of the so-called 1929 conspiracy which you have described in detail in your complaint?

Does that cover what you have in mind?

(Testimony of George B. Burnham.)

Mr. Carr: Yes, your Honor.

The Court: Do you wish to object to that?

Mr. Harrison: No, your Honor.

The Witness: A. In the fall of 1944.

Q. (By Mr. Carr): And how did you discover it then? A. When I read——

Mr. Harrison: What is that?

Mr. Carr: Q. How did you discover that?

Mr. Harrison: I object to that as being immaterial, if the Court please. The question is his knowledge and belief [456] from 1929 to 1939.

Mr. Carr: No, your Honor. It deals with how he happened to discover it, and that is pertinent: how he happened to discover it.

The Court: I will hold that that is incompetent, irrelevant and immaterial. I think I have made a previous ruling on that before.

Mr. Carr: I ask permission to read these paragraphs on the 1929 agreement. The Jury has no knowledge of what they are, and yet the complaint sets them forth in full, and we believe, as we have contended all through, that the failure of the defendants to answer these portions of our complaint constitutes an admission for purposes of this proceeding, may it please your Honor, of the allegations therein existing.

The Court: I hold that that is immaterial, Mr. Carr. It could be the most dastardly conspiracy that human ingenuity could devise and it still won't change the question here to be determined, and that is whether the plaintiff had knowledge of it. It

(Testimony of George B. Burnham.)

doesn't make any difference whether it is just a mild conspiracy or a bad one or the worst one we ever heard of. It won't make a bit of difference if you read it to the Jury, because how bad the conspiracy was does not affect the question of whether the plaintiff had knowledge; so I do not see how that helps us. I will adhere to my previous ruling.

Mr. Carr: So that our record may be clear, we ask now, if it please your Honor, for permission to read to the Jury Paragraphs 62, 63, 64, 65, 66, 67 and 68 of the complaint.

Mr. Harrison: To which we object, if your Honor please.

The Court: I will say to you that if we had on the witness stand someone who did not know the contents or the nature of the conspiracy that was charged, so that you would have to identify it with greater particularity, there might be some reason for taking up the time of the Jury and the Court in propounding such a long question, but the man who signed the complaint is on the witness stand. He is fully acquainted, as is evident from his testimony, with everything that is involved in this case and therefore it is unnecessary to go to that length in framing the question. I will sustain the objection.

Mr. Carr: I want to be sure I get in all those paragraphs we would offer here.

Q. Mr. Burnham, have you in mind the allegations of those paragraphs to which I have just referred?
A. Yes.

(Testimony of George B. Burnham.)

Q. Would you like to read yourself those allegations before you reply further without my reading them to the Jury, to refresh your memory?

A. Yes.

Mr. Carr: May I then— [458]

Mr. Harrison: I submit, if the Court please, there is no question before the Jury.

Mr. Carr: I am asking him, in view of the Court's refusal to allow us to read these paragraphs from our own complaint, which is the basis and which forms the basis of our cause of action here, and I number them as I go through, I ask the witness, in order to be absolutely fair with the Court and Jury, when he answers that he have actually in mind the allegations of the complaint.

The Court: The witness has not expressed any doubt that he understood when he answered the Court's question what the allegations of the complaint were. Mr. Burnham understands it. I do not think he would answer the question unless he did.

Mr. Carr: He knows generally.

Q. Mr. Burnham, would you like to read those allegations of the complaint before you answer?

Mr. Harrison: I object to that, if the Court please. Whether he would like to or not is not proper. There is no question before him.

Q. (By Mr. Carr): Do you recall all those allegations within those paragraphs to which I have referred?

A. Oh, in a general way, the main one.

(Testimony of George B. Burnham.)

Q. What do you consider the main one?

A. That was the conspiracy—— [459]

Mr. Harrison: I object to that.

Mr. Carr: Wait a minute.

Mr. Harrison: It would be a question for the Court as to what the main one is and not the witness.

The Court: I sustain the objection.

Mr. Carr: I thought, your Honor, with all due respect, that we at all times, the plaintiff at all times had the right to read to the Jury and to the Court the allegations of his own complaint on which his action is based.

The Court: That might be true in a trial on the merits.

Mr. Carr: This is the same as a trial on the merits so far as the statute is concerned. It is a trial on the statute, and that is exactly the same as a trial on the merits, confined to that question.

The Court: The Court will adhere to the ruling heretofore made.

Mr. Carr: Will you read the Court's question and the answer of the witness?

(The reporter read as follows:)

“Q. When did you first obtain any knowledge of the so-called 1929 conspiracy which you have described in detail in your complaint?”

A. In the fall of 1929.

Q. (By Mr. Carr): 1929?

A. 1944, excuse me. I was thinking of the 1929 agreement. [460]

(Testimony of George B. Burnham.)

Mr. Carr: Mr. Reporter, what was the previous answer of the witness?

(The reporter reading):

"In the fall of 1944."

Q. (By Mr. Carr): Let me ask you this: At any time prior to the fall of 1944, did you believe that such a conspiracy as alleged in your complaint, known as the 1929 conspiracy, existed?

A. No.

Mr. Harrison: Just a moment, if the Court please, Mr. Carr. If your Honor please, there is another objection to the 1929 conspiracy and I would like to state it for the benefit of the record. The 1929 conspiracy alleged in the complaint had nothing to do with the damage done to the plaintiff in 1928 and 1925. The damage alleged in the complaint is alleged to have resulted from the fraud order in 1925 and the price cut in 1928, and on that ground also we object to the question.

Mr. Carr: But also the fraud order activities of the defendant as alleged in the complaint carried over until long after the 1929 conspiracy; the same had to do with the price cut. The same had to do with the Little Placer. The same had to do with the loss by the plaintiff of his lease on Searles Lake. The complaint, as your Honor knows, alleges that in 1919 this conspiracy was formed. That is the basis of our cause of action here. Our cause of action grows out [461] of that allegation. And then we also allege in the complaint that the 1929 agree-

(Testimony of George B. Burnham.)

ment also picked up prior and subsequent conspiracies and carried them on. Naturally they would carry on the subsequent one, but the damage that resulted to this plaintiff did not accrue until long after 1929. It is true, your Honor, we did not lose our plant or our lease until 1928——

The Witness: 1938.

Mr. Carr: 1938.

The Witness: 1938.

Mr. Carr: Excuse me. I should have said 1938. That you, Mr. Burnham. And during all of that period from 1929 to 1938 defendants were active in pursuance of the activities in reference to the fraud order and to the price cuts and to the Little Placer and to the loss of the lease on Searles Lake, and it was in 1938 that we lost our plant.

Mr. Harrison: If your Honor please, I submit that Counsel's statement involves a total misconception of the question submitted to the Jury and of the rulings of your Honor heretofore made. Those statements can only be confusing.

The Court: The issue submitted to the Jury, the issue that is framed for submission to the Jury covers the knowledge of the plaintiff or cause for belief on the part of the plaintiff during the period from 1929 to 1939.

Mr. Carr: Yes, your Honor, but we did not refer to the [462] 1929 agreement. Now, all the testimony that has gone in here has referred to the conspiracy surrounding the overt acts specially, not to the 1929 agreement. It is not until now that the

(Testimony of George B. Burnham.)

1929 agreement—and there was one reason why we think, with all due respect, your Honor was in error in making that pre-trial order without confining it to the allegations of the complaint.

The Court: If I remember rightly—my memory may be bad—both sides submitted forms to me.

Mr. Carr: We did.

The Court: Covering that precise period of time, you may have objected to the form in which I put the order, but no one, so far as I know, ever objected to the period of time because you submitted a form of question to go to the Jury covering the same period of time.

Mr. Carr: No, your Honor, I think if you will go back and look at our proposed instruction at the time, you will see we did not. With your press of other work here I do not see how you keep everything in your mind as you do. But the basis of our complaint is the 1929 conspiracy. We discussed the matter generally. Your Honor picked May 17 as a starter. We never suggested that to your Honor. Counsel made several suggestions along that line, as I recall, but we never did.

Mr. Harrison: May I suggest to your Honor that the question to be submitted to the Jury relates to the plaintiff's [463] knowledge or cause to believe that it had been theretofore damaged; that is to say, damaged before May 17, 1929.

Mr. Carr: No, your Honor.

Mr. Harrison: I think it is very clear.

Mr. Aitken: That is not the issue at all.

(Testimony of George B. Burnham.)

Mr. Carr: We are standing on the allegations of our complaint, and the allegations of that complaint cannot be escaped by attempting to introduce a lot of evidence as to overt acts. We make no charge of these specific overt acts in the complaint. We do not ask for any damages for those overt acts or the conspiracy surrounding them. We ask for damages growing out of the 1929 conspiracy.

Mr. Harrison: The question to be submitted, settled by your Honor, was whether or not the plaintiff knew or had cause to believe that the damage theretofore suffered by the plaintiff was the result of a violation of the Anti-Trust Laws.

Mr. Carr: Yes, that is the order your Honor made.

Mr. Harrison: And "theretofore suffered" is before this period, and the only damage alleged in the complaint is the damage before this period.

Mr. Carr: No, it is not.

Mr. Harrison: If your Honor will refer to the language of the question I think it will be entirely clear.

The Court: I recall. I do not think I have the file that has the briefs. [464]

Mr. Carr: I am sure your Honor will see—

The Court: There was a number of letters, I know, that I received from both sides in connection with this matter.

Mr. Carr: Yes, but we made no such suggestions. We wanted your Honor to give much fuller instructions and your Honor evidently picked

(Testimony of George B. Burnham.)

neither of us—I know we did not request you to fix the date of May 17. We did not ask you to do that. Your Honor evidently picked that because it was the date of the Zabriskie interview.

The Court: Mr. Carr, I have to differ with you on that. I did not fix any dates in the matter at all. Both counsel sent me a number of letters, which the Clerk does not seem to have, and in those letters and briefs these dates were mentioned. Both sides mentioned them.

Mr. Carr: No, your Honor, I do not want to be discourteous.

The Court: What was in dispute was the form of the language to be used in defining the issue.

Mr. Carr: No, your Honor, we could not have because I am certain of that and, as I say, our whole complaint is based upon that 1929 agreement, not on the conspiracy surrounding the overt acts.

The Court: We have gotten into a lengthy argument and away from the question before us. You asked a question and Mr. Harrison objected to it about the 1929 agreement. Will [465] you read the last question and answer?

(The reporter read as follows:)

“Q. Did you believe that such a conspiracy as alleged in your complaint and known as the 1929 conspiracy existed? A. No.”

The Court: Now, have you another question? Let us go on from there. I will allow the answer

(Testimony of George B. Burnham.)

to stand because I do not regard the answer as any different from the answer the witness gave on his direct examination. He is just repeating what he said.

Mr. Carr: But there was no reference in the direct examination, your Honor, to the 1929 conspiracy.

Mr. Harrison: If your Honor considers that the 1929 conspiracy enters into the situation, we would like to be heard, because we understood the question defined for submission to the Jury was about the plaintiff's knowledge of damage caused to him before 1929.

The Court: If this case goes to the Jury I am going to instruct the Jury that the statement of an opinion on the part of the witness is not evidence. The matter has to be determined on the facts, what was said and done, and not what the opinion of the witness is.

Mr. Carr: Yes, but your Honor used the word "belief" in your pre-trial order, and that is why I am asking that. We had to ask him that. [466]

The Court: I put in the pre-trial order whether the plaintiff had knowledge or good cause to believe.

Mr. Carr: He has answered that. Will your Honor pardon me just a moment?

Q. Mr. Burnham, did you ever prior to the fall of 1944 hear of any agreement entered into by the defendants in reference to price cuts or monopolization of the borax industry?

A. Could you state that question again?

(Testimony of George B. Burnham.)

Mr. Harrison: Just a moment, please. I do not understand what the question means unless it is a mere repetition of the previous question.

Mr. Carr: No, it is another thing, another phase. Will you read the question, Mr. Reporter?

(Question read.)

A. Not by these defendants in our case.

Q. (By Mr. Carr): Your answer is, then——

Mr. Harrison: Just a moment. He has given the answer.

Mr. Carr: I did not hear it.

Q. Do you mean that none of the defendants told you or that you had not heard? What do you mean by that?

A. Well, the defendants in our case——

Q. What?

A. The defendants in our case, as I understand it, are the American Potash & Chemical Company, the Pacific Coast Borax Company, the Stirling Borax, the San Bernardino Borax [467] Company, the Borax Consolidated of London — Limited, I mean.

Q. Did what?

A. I never heard of any conspiracy between these people mentioned on our complaint.

Q. Prior to the——

A. Prior to the fall of 1944.

Q. Does that also refer to the 1929 agreement in that complaint?

Mr. Harrison: That is objected to on the ground it is immaterial, if the Court please.

(Testimony of George B. Burnham.)

Mr. Carr: No, it is not.

Mr. Harrison: On the ground that the damage alleged in the complaint occurred before 1929, on the ground that the question to be submitted to the Jury is whether the plaintiff knew or had cause to believe between 1929 and 1939 that it had theretofore been damaged, and that therefore any testimony relating to the 1929 agreement or alleged agreement would be immaterial to that question.

Mr. Carr: The whole case is based on the 1929 agreement.

The Court: I will sustain Counsel's objection. I think you are in error, Mr. Carr.

Mr. Carr: Will you bear with us a moment, your Honor? I think that is all.

Mr. Harrison: We may be able to shorten the recross-examination if we could recess for a few moments now.

The Court: We will take the afternoon recess. Please bear in mind the admonition.

(Recess.) [468]

Recross-Examination

By Mr. Harrison:

Q. Mr. Burnham, there was offered in evidence a short time ago a copy of the resolution introduced in the United States Senate by Senator Pittman of Nevada. A. Yes.

Q. You were familiar with the introduction of that resolution about the time it was introduced, were you not? A. Yes.

(Testimony of George B. Burnham.)

Q. And about that time, and before you had discussed the question with Senator Pittman of such an investigation, had you not? A. Yes.

Q. And had you furnished him with a copy of the amended complaint in the fraud suit, copy of which has been introduced in evidence here?

A. No.

Q. Had you furnished him with a copy of the Mather letter? A. No.

Q. You told him, did you not, you believed it was a violation of the Antitrust Laws in connection with the borax industry?

Mr. Carr: We object, as incompetent, irrelevant, and immaterial; it has nothing to do at all with the issue.

The Court: I will overrule the objection.

Q. (By Mr. Harrison): What is the answer?

A. The answer is no.

Q. You discussed with him the borax situation, did you not, [469] as related to the potash situation. A. I talked to him about Searles Lake.

Q. You talked to him about Searles Lake?

A. Yes.

Q. Did you tell him about the damage you had suffered?

Mr. Carr: Same objection, may it please your Honor. We would like to keep our record straight.

The Court: Very well, the same ruling.

Q. (By Mr. Harrison): Mr. Burnham?

A. What time are you referring to now in your question?

(Testimony of George B. Burnham.)

Q. I am referring, first of all, to about the time this resolution was introduced. You discussed that subject with Senator Pittman, did you not?

Mr. Carr: What, the question of the resolution?

Mr. Harrison: Yes.

The Witness: A. I talked with him about Searles Lake, but I didn't know he was going to put it into a resolution.

Q. But you told him about the situation at Searles Lake, did you not? A. Yes.

Q. And you told him about the damage you had suffered, did you not, or that your company had suffered?

A. Yes, in 1925 or 1926, around in there I told him about the Post Office Fraud Order.

Q. And you told him about the damage that it had done to you? [470] A. Yes.

Q. Did you tell him in the '30's, around 1936, that you had suffered damage as the result of the price cuts?

Mr. Carr: Same objection——

The Witness: No, I didn't tell him.

Mr. Carr: Wait a minute, until I object, Mr. Burnham. We make the same objection as we made to the previous questions.

The Court: I will overrule the objection.

Q. (By Mr. Harrison): You had several discussions with Senator Pittman, did you not?

A. Yes.

Q. And those discussions related to the borax and potash industry, did they not?

(Testimony of George B. Burnham.)

Q. Now, you are talking about before 1936 or after 1936?

Q. Well, let us take it, first, before 1936.

A. My talks with him were in 1926 and 1928 and 1929, I believe, and they were principally about the Post Office Fraud Order, and the situation in general at Searles Lake.

Q. Well, you talked to him in 1936 and 1937, did you?

A. Yes, that was right—in 1936 and 1937, too.

Q. And you told him about your situation at Searles Lake, did you not? A. Yes.

Q. And you told him that you had been injured by reason of the price cut, did you not? [471]

Mr. Carr: Same objection, may it please your Honor.

Q. (By Mr. Harrison): Mr. Burnham?

Mr. Carr: Wait a minute.

Mr. Harrison: Excuse me.

The Court: I have forgotten now what your objection was.

Mr. Carr: I said it is incompetent, irrelevant and immaterial. It had nothing to do with the subject-matter at all.

The Court: I will overrule the objection.

Mr. Harrison: Will you read the question?

(Question read.)

Mr. Carr: And furthermore, it has been asked and answered previously two or three times.

(Testimony of George B. Burnham.)

The Court: Of that I am not sure. You may be right about that, but I don't recall the witness being questioned about his conversations.

Mr. Carr: Yes, your Honor, he was, just a few moments ago.

The Court: Yes, but counsel has divided it up into two periods, before 1936 and after 1936.

Mr. Carr: He didn't first ask any specific time.

The Court: I will overrule the objection.

Q. (By Mr. Harrison): I am now referring to conversations in 1937 as well as 1936, Mr. Burnham: You did discuss the matter of the damage that had accrued to you as the result of the price cuts with the Senator, did you? [472]

A. In 1936 and 1937, yes.

Q. Now, then, you testified this morning about this matter of your conversation with Mr. Zabriskie, and did I understand your testimony to be that according to your present recollection you had a conversation with Mr. Zabriskie on March 27, 1929?

A. On or about March 27, 1929?

Q. Can you fix the date of that conversation?

A. Pretty close to the 27th of March, 1929.

Q. That is the only date you have?

A. Yes.

Q. Now, it is true, is it not, that at the time you gave your deposition in this case, and at the time when you read through your deposition and corrected it, you did not have any recollection at all of that conversation? A. That's right.

Q. Now, have you the original telegram which you sent, or a copy of the original telegram which

(Testimony of George B. Burnham.)

you sent to your company, a draft of which you read from your notebook this morning?

A. I have the preliminary rough draft of that telegram, yes.

Q. Apart from the diary?

A. In my notebook, yes.

Q. May I see it, please? That is what—in your notebook? A. Yes.

Q. But I am now talking about the copies of the telegram, or the copy of the original telegram.

A. I wouldn't know where to look for it. [473]

Q. You wouldn't have any idea where to look for it?

A. It might be buried in our files, but on the other hand it might be thrown away. A lot of the old correspondence has been thrown away.

Q. And you don't know now where to find it?

A. No, I wouldn't know where to look.

Q. You made an endeavor to find all the papers that bear on this situation, and you have been searching for a long time?

A. Yes, but I didn't find that.

Q. And you believe you did send a telegram on that day? A. Yes.

Q. As a matter of fact, you were not in New York, but you were in Philadelphia on March 27, were you not?

A. I was in New York and Philadelphia off and on during that time. I can refresh my memory very closely from my notes I have made as to where I was.

(Testimony of George B. Burnham.)

Q. I call your attention, just for the purpose of helping you to refresh your recollection, to page 249 of your deposition, where in looking at your notes and diary, you said at line 19 on page 249:

“Well, evidently I was in Philadelphia on March 27th.”

Mr. Carr: What line is that?

Mr. Harrison: That is line 19 on page 249.

Q. I will ask you whether it is a fact, refreshing your recollection from your diary, your testimony on deposition was not [474] true that you were in Philadelphia on March 27, 1929? What are you looking at now, Mr. Burnham?

A. The various places where I was in March.

Q. Where did you make that memorandum from? A. In the black book.

Q. I would like you to look at the diary now, if you please.

A. I was in one town on one day and in another town on another day.

Q. I call your attention, Mr. Burnham, that on your deposition you did not base it on your diary, and you said you were in Philadelphia on March 27, and I would like you to look in your diary.

A. I see on March 28 I went to the Bronx Zoo and saw the Great Crown Pigeon on March——” Oh, here is another bird, “Western New Guinea, the largest and ——” looks like “Finest in the world, and the Concave C-a-s-q-u-e-d Hornbill that comes from Southwest India, imprisons its mate during incubation in a hollow tree.”

(Testimony of George B. Burnham.)

The Court: This is all very interesting, but counsel is asking you about March 27, not March 28. What does your diary show about that?

A. The diary doesn't show definitely whether the telegram was sent from Philadelphia or New York.

Q. (By Mr. Harrison): But does the diary show where you were on March 27, Mr. Burnham?

A. We had a meeting of stockholders in Philadelphia about the 24th or the 26th and a meeting of the stockholders in New York about that time, also.

Q. As a matter of fact, your meeting of the New York stockholders was on March 24, was it not?

A. On March 24?

Q. Yes.

A. I don't remember, but I was going from one town to another in very short periods of time.

Q. I will ask you to take a memorandum and look at your diary and see whether or not you were correct in your deposition when you said, "Evidently I was in Philadelphia on March 27"?

A. In my deposition I did not have exactly the dates, but I noticed I was in New York City March 24, in Philadelphia on March 26, and in New York City on March 27.

Q. What are you reading from now?

A. These notes.

Q. What notes?

A. These notes.

Q. Are they diary notes, or some other notes?

(Testimony of George B. Burnham.)

A. Those notes were gathered from the diary and from the copies of the Burnham Crystals that I sent you, or that I gave you.

Q. Were you mistaken in your deposition looking at your diary at the time and evidently you were in Philadelphia on March 27

A. The answer is right here in the telegram, apparently. Can I [476] read the whole telegram?

Mr. Carr: Yes, go ahead.

Mr. Harrison: We will get to that in a moment.

Q. Were you mistaken when you said in your deposition, looking at your diary at the time, that you were in Philadelphia on March 27?

Mr. Carr: He said, "evidently"; he didn't say "positively." It is possible for him to be in both cities on the same day.

Mr. Harris: We all understand that, Mr. Carr, but I am asking him if he was correct in his statement in the deposition that he was in Philadelphia on March 27th.

Mr. Carr: He could be in both cities.

The Witness: I couldn't answer that definitely, because I might have been in both cities the same day.

Q. (By Mr. Harrison): Were you or were you not correct in saying you were in Philadelphia on that day? Or, if you don't know, I don't want to press it.

A. I don't remember at this particular moment.

Q. Very well, and the diary doesn't furnish clear evidence as to which place you were on that day?

A. That's right.

(Testimony of George B. Burnham.)

Q. You have a note of the draft of the telegram?

A. Yes.

Q. And you don't remember now whether that telegram was sent from Philadelphia or New York?

A. The contents of the telegram gives you some idea.

Q. Did you in fact send such a telegram, or do you know?

A. I made the preliminary draft, and I am very confident that I sent it.

Q. You simply believe that because you have the draft in your book?

A. Well, it is a very important meeting, and the San Francisco office wanted to know what was going on.

Q. Will you read this, your note of the draft of the telegram, which you wanted to read a moment ago?

A. "March 27, 1929. B. C. Co.—47 at Philadelphia meeting. Results similar to New York meeting. Philadelphia meeting similar to New York. Stop. New York Finance Committee meeting Thursday."

Then I got, "B.C. Co. Would like opinion directors whether we can finance if New York Committee recommends contingent campaign. Stop. If can might suggest cash discount to stockholders paying pledges after campaign is launched and before completed in order to secure funds while campaign in progress. Stop. Wire me Commodore Hotel status borax sales and any developments regarding sale of

(Testimony of George B. Burnham.)

salts to Doblears. Stop. Zabriskie not yet heard from London in answer our letter because Baker sick."

Q. Now, what is there in that telegram that convinces you [478] it was sent from New York rather than from Philadelphia?

A. Well, just because I saw the Bronx Zoo on the next page.

Q. But that was on the 28th of March.

A. Yes.

Q. And this was on the 27th.

A. Yes, but I might have been in both towns.

Q. You might have been in Philadelphia when you drafted that telegram?

A. That is possible, yes.

Q. You made a note of conversations in that diary, of conversations you believed to be important, did you not?

A. Yes.

Q. Is there any note of any conversation with Mr. Zabriskie on March 27th on the subject of the infringement, the subject to which you refer in the draft of the telegram?

A. This is the only item I could find.

Q. In other words, the only item you could find is the reference to a draft of the telegram?

A. Yes.

Q. And there is not a line there with respect to any conversation with Mr. Zabriskie in March?

A. That's right.

Q. And you may have received that information about Mr. Baker not having answered him over the telephone, may you not?

(Testimony of George B. Burnham.)

A. No, when I read this I had brought back to me more of the [479] conversations I had with Mr. Zabriskie about the patent situation.

Q. Isn't it true that you received letters from Mr. Zabriskie in answer to your letter of January 15?

A. Well, I couldn't find anything in our files.

Q. Haven't you any recollection as to whether or not he acknowledge that letter?

A. It seems to me we should have gotten that acknowledgement but I couldn't find it in the file.

Q. You haven't any recollection now as to what answer in writing he made when you sent him that letter on January 15? A. No.

Q. Nor, when he made it, if he did make it?

A. No.

Q. And at the time of your deposition you didn't remember this conversation at all, did you?

The Court: He has already answered that.

Mr. Harrison: Yes.

Q. The fact is, as I get it from your diary, you made notes about the birds at the Zoo, but you didn't make any notes about the Zabriskie conversation in March, is that correct, Mr. Burnham?

A. Yes, that is correct.

Q. Let us turn to that May 17, 1929, note in your book. Mr. Carr asked you some questions about that this morning and [480] you testified, as I understand it, that the first page was written in at the time of the conversation, but that the other page was written two days later, or thereabouts, isn't that true? A. Which other page?

(Testimony of George B. Burnham.)

Q. Well, the other entry. You have it before you. Will you turn to it?

A. You mean the other conversation with Mr. Zabriskie?

Q. No, I am talking about the Emlaw conversation on May 17, 1929: You have one page which you say was made about the time of the conversation, and Mr. Carr asked you why some other note about what Mr. Emlaw said appears on another page: You remember that?

A. Yes, this is several pages over.

Q. Yes, and you said it appeared several pages over because you wrote it several days after the conversation, isn't that true?

A. Not several days.

Q. Well, a couple of days?

A. Not several pages.

Q. Well, two pages over.

A. Wait, the March conversation was here on these pages and the May 17 conversation was——

Q. I can save you the trouble.

The Court: Mr. Harrison is not inquiring about that. [481]

The Witness: A. Then I misunderstood your question—excuse me.

Q. (By Mr. Harrison): I am talking about your notes of the May 17 conversations with Mr. Emlaw. A. Yes.

Q. And I call your attention to the fact that a part of the notes of that conversation appears upon your page, is that correct? A. Yes.

(Testimony of George B. Burnham.)

Q. And you also have a note at a later page, something to the effect that "Emlaw says"?

A. Yes.

Q. You told Mr. Carr this morning and testified in response to his questions that that later entry did not appear on the same page as the first entry because the later entry was made a couple of days thereafter, isn't that true?

A. Yes, something like that.

Mr. Carr: I don't think he said "a couple of days."

Mr. Harrison: He said, "Something like that" just now, Mr. Carr. I think he can take care of himself on this.

Mr. Carr: Yes.

Q. (By Mr. Harrison): Now, what I want to ask is this: Is there anything in the entry which you first made on the original page that refers to any accusation or denial of any discussion whatever of your charge and accusation of conspiracy? [482]

A. With——

Q. With Mr. Emlaw.

A. No, not with Mr. Emlaw.

Q. And the only entry you claim now has any reference at all to that discussion of that subject was some entry you made sometime later at a later page, isn't that true?

A. Yes, but I remember the conversation.

Q. Yes, and I understand you so testified. Now, then, on that phase of the question, it refers to a sale but it doesn't say what thing is being sold, does it?

A. No.

(Testimony of George B. Burnham.)

Q. Now, let me refresh your recollection on that matter: Hadn't you been discussing with Mr. Zabriskie the question whether somebody had bought out the American Potash & Chemical Company, the du Ponts?

A. Mr. Zabriskie asked me if I *knew* had bought out the American Potash & Chemical Corporation.

Q. Now, then, you will read—excuse me. Have you finished?

A. At least that matter came up at our conversation.

Q. The answer was, had they been sold out?

A. Yes.

Q. Now, will you read literally what you had on the other page with respect to what Mr. Emlaw says?

A. "May 17, 1929"—

Q. That is the second entry now. I have no objection to your [483] reading the first, but what I am interested in is the second entry, the one on the second page.

A. Not necessarily second in time—

The Court: We are wasting too much time going over the same entries. Start reading the entry that begins with the words "Emlaw says."

A. "Emlaw says not selling—nothing in it—would sell if could get an offer."

Q. (By Mr. Harrison): You know as a matter of fact that as far as borax was concerned he was selling at the time, do you not?

A. That is what he told me.

Mr. Harrison: That is all.

(Testimony of George B. Burnham.)

Mr. Carr: That is all.

The Court: That is all.

Mr. Carr: Oh, just one more question.

Further Redirect Examination

By Mr. Carr:

Q. Mr. Burnham, was it possible for you to be in both Philadelphia and New York on the same date? A. Yes.

Q. And when you testified on your deposition and said, "Evidently I was in Philadelphia," did you or did you not mean that you were positively in Philadelphia, or were you surmising?

A. I was roughly guessing. [484]

Mr. Carr: That's all.

Mr. Harrison: That's all.

The Court: That's all, Mr. Burnham.

Mr. Carr: Plaintiff rests.

(Plaintiff rests.)

Mr. Harrison: We rest.

(Defendants rest.)

The Court: I will excuse the jury at this time until tomorrow morning.

Ladies and gentlemen of the jury, the court will probably have some legal matters to discuss with counsel at this time, as you may have surmised from various colloquies. I will therefore excuse the jury until tomorrow morning at ten o'clock. Please bear in mind that it is still your duty not to discuss this

case among yourselves, nor allow any other persons to discuss any matters in connection with this case with you, nor are you to form or express any opinion thereon until the case is finally submitted to you.

(Thereupon the jury was excused from the courtroom.)

Mr. Harrison: We desire to make a motion at this time to instruct the jury to answer in the affirmative to the question submitted to them, and we make that motion on two separate grounds:

In the first place, that the evidence shows without conflict that the plaintiff did know and had cause to believe [485] at times during the period specified in the question that he had been damaged as the result of violations of the United States Anti-trust Laws by the defendants; it appearing that there is an affirmative evidence that he had so known and there is no contradiction to that beyond mere opinion evidence on his part.

The second ground of the motion is that it now affirmatively appears that the only statement made by Mr. Zabriskie or Mr. Emlaw which could have been relied on by the plaintiff was a mere naked denial of the accusation of conspiracy. The only other statements made by them at that time having any relation to the subject were of facts which the plaintiff already knew and the plaintiff has no right to rely upon a mere denial of an accusation.

Mr. Aitken: May the record show that the defendant American Potash & Chemical Corporation joins with Mr. Harrison's clients in this motion.

The Court: Yes.

Mr. Carr: The evidence is clear that the plaintiff did not know of the so-called conspiracy, never heard of it until 1944, and never heard anyone discuss it. The evidence also shows, or rather his statement is that he did not know any of these things prior to or in response to the question which your Honor states you would submit, knew nothing of those things. His answers were "No" to all of them, so you have a clear conflict [486] that should go to the jury.

At the same time we desire to make a motion for an instructed verdict on our behalf because the evidence shows conclusively that the plaintiff knew nothing about the 1929 agreement and conspiracy which is the basis of our action.

We did not plead these overt acts, as charges in our complaint, but every reference to them was as overt acts of the conspiracy so-called. Now, we having elected to stand on that conspiracy, and with all due respect I say neither the court nor counsel can change our course of action into actions on the separate cause of action, that is, the overt acts, rather.

We believe as the evidence now stands we are entitled to a directed verdict in our favor because the only question that could be presented under the state of the pleadings is whether or not the 1929 conspiracy which is the basis of our action, was known, or that plaintiff had any knowledge of that at any time prior to November 10, 1939.

We believe on that ground we are entitled to a directed verdict, that the only evidence brought

out by the defendant is as to these overt acts, the separate overt acts. No evidence at all exists at all to show any knowledge on the part of the plaintiff of the 1929 conspiracy, and that is as I have stated many times, and I do not intend to be boresome to your Honor, but there is no evidence of the 1929 conspiracy, [487] that it was known to us, and that conspiracy is the basis of our action, not the overt acts.

We are not suing for damages for the overt acts. We are suing for damages which accrue to us by the existence of the '29 agreement.

The Court: You mean you can form a conspiracy after the overt acts are committed?

Mr. Carr: Why, yes, your Honor, certainly. The fact that we might not be able to recover on those prior overt acts is one thing, but we are suing that the damage resulted to us subsequently. [487-a]

If we wanted to sue alone on the fraud order case, we, of course, would have sued on that conspiracy, likewise on the price cut, but we did not elect to do so. We elected to sue on the main conspiracy of 1929. Now, the question of whether we would be able to recover on the main conspiracy of 1929. Now, the question of whether we would be able to recover on the main trial for those things that existed prior to the 1929 conspiracy is an entirely different thing. That question is not presented here at all. That question is not involved in this. The only question here is that we know of or have any knowledge of or were put on notice of the 1929 agreement. That is the only thing, and with all due respect to your

Honor's question and to counsel, that cannot be changed: The plaintiff having elected to stand on that 1929 agreement, he is entitled now so to do.

The Court: Of course, if the evidence were to show without dispute that he had knowledge of the 1929 conspiracy within the period of the statute of limitations, his action would now be barred——

Mr. Carr: Not in the slightest, no. The evidence is all to the contrary.

The Court: If both sides are making a motion for a directed verdict in this case, isn't that pretty persuasive that it is a matter of law for the court to decide?

Mr. Carr: No, I do not think so. I think we are entitled [488] to go to the jury.

The Court: Here is what is disturbing me about this case, Mr. Carr: Maybe I am taking too quick a look at it, as it were, not an objective enough look at it. We have had one witness who has testified in this case. What factual controversy is there for the jury to resolve? Nobody has disputed the questions of any conversation, the execution or sending of any document. What factual matter would the jury have to decide—for example, whether or not a conversation occurred, when it has not been disputed?

Mr. Carr: This is the question involved: Did the plaintiff have knowledge of the 1929 conspiracy, or was he put on notice?

The Court: That is the question, but does the resolution of that question require the settlement of any disputed factual questions?

Mr. Carr: Yes, your Honor.

The Court: What testimony has come into this case of any factual nature that is disputed?

Mr. Carr: There is none——

The Court: It is disputed that the man had knowledge.

Mr. Carr: No.

The Court: That becomes a question of law, if the occurrences themselves are not in dispute.

Mr. Carr: No, your Honor, there is no dispute of Burnham's testimony as to his lack of knowledge of the 1929 agreement. [489]

The Court: I do not think I made clear to you what I meant. The witness Burnham has testified to certain facts. He has testified to conversations he had with people. He has testified to letters that he wrote. He has testified to letters that he received, documents that were executed by him or received by him have been put in evidence. Now, none of those things that he has testified of a factual nature have been disputed by anyone.

Mr. Carr: But they all involve the overt act and not the 1929 conspiracy.

The Court: Irrespective of what they involve, what is there in dispute of a factual nature?

Mr. Carr: There is nothing so far as we are concerned as to the 1929 agreement. Burnham testified that he did not know about it.

The Court: Of course, there are documents in evidence that he signed that, irrespective of what he said, might be susceptible to the interpretation that he did have a full knowledge of that, but there

is no factual question that arises. It is a question whether that in law amounts to knowledge, and I cannot submit a question of law to the jury.

Mr. Carr: No, your Honor, that is not the situation. The question is, all of those things which you have mentioned referred and all the testimony has gone to the commission of [490] the overt acts, not to the conspiracy. They all have referred to the overt acts. Let us suppose, for the sake of—

The Court: Mr. Carr, I cannot agree with you on that. If I were going to decide the case as the trier of the fact, I can recall documents that have been offered in evidence that refer, if you go back and look at some of the letters that were written after 1929—

Mr. Carr: But they do not refer to the 1929 agreement. That would not show they had knowledge, because they were all in reference to overt acts, not to the conspiracy, itself. Evidently our minds do not meet, if it please your Honor.

The Court: Our minds do not meet on that because I could not possibly hold, and I do not think there is any decision that goes to the effect that in order to show a person has knowledge of a conspiracy you have to show that he actually knew of an agreement that was in existence. There is no such law as that.

Mr. Carr: You are right, but the evidence here goes, as I say, to the overt acts, the commission of the overt acts. There might be a conspiracy in advance of the general conspiracy. There could be a conspiracy to permit the fraud order. There

could be a conspiracy involving the price cuts. There could be a conspiracy involving the Little Placer, and likewise the Searles Lake. There could be all of those, four different conspiracies. Now, all the evidence goes to prove [491] that plaintiff should have known about there being a conspiracy to fix the prices, a conspiracy to put the fraud order case, but that is not evidence of the basis of our complaint, and neither your Honor nor counsel have a right to change our complaint from a complaint and a cause of action based upon the conspiracy of 1929 to four other conspiracies involving overt acts. Now, you have no right to do that—and I am speaking with all due respect, your Honor, on the legal question. You cannot change the cause of action.

The Court: I am not attempting to change your cause of action. The only question before me now is whether or not there is any factual dispute that the jury can pass upon. How am I going to instruct the jury as to the facts in the matter? It is not disputed, no one has disputed Mr. Burnham's statement as to his conversations with these various people. No one has disputed the sending or receipt of the various documents. There they are. Now, what conclusion should be drawn as to whether or not there was knowledge of this conspiracy, no matter what conspiracy you are referring to, is not a matter that requires any factual resolution, does it?

Mr. Carr: Yes, it does, whether they gave facts, whether they gave information of the conspiracy, but they were all directed to the overt acts and not to the conspiracy charged in our complaint, and

upon which we are entitled to rely. Now, all of the evidence—and I say again at the expense of [492] repetition—all the evidence only goes to the conspiracies involving each overt act. Not one of them touch or indicate in the least that we had any knowledge of the basic conspiracy of 1929 until the filing by the Government here of its indictment. There is no evidence at all on that subject, absolutely none, and counsel cannot attempt to change our cause of action from one on the basic 1929 conspiracy to one on four different overt acts. We are not trying the overt acts on the main question. When the main case comes up, unless we can prove that we suffered damage from these overt acts or these activities prior to the 1929 conspiracy, we can, of course, not recover. That is not the question here.

The Court: You mean you could not show any damage from the 1929 conspiracy?

Mr. Carr: Under the 1929 conspiracy which we stand on here.

Mr. Harrison: He does not plead any damage under the 1929 conspiracy.

Mr. Carr: Oh, yes, we do. We plead lots of damage.

The Court: Maybe I misunderstood what you just said. I gathered from what you said that you would not be able to show any damage from the 1929 conspiracy.

Mr. Carr: No, I said if we could not. I do not say we cannot, because we believe we can. But the overt acts all go to the measure and extent of the damage resulting from the [493] basic con-

spiracy of 1929. If we cannot, when it comes to the main trial, prove that those damages were not incurred as the result of the 1929 conspiracy, of course, we cannot recover. But that is not the question here. The question here is whether or not the statute has run as to the 1929 conspiracy, and nothing else is before this court at this time.

Mr. Harrison: May I be heard, if the Court please, briefly?

The Court: Yes.

Mr. Harrison: Most of the matters about which Mr. Carr speaks at the present time were discussed at considerable length on the motion to dismiss, and upon the motion settling the issue to be tried here. Now, we pointed out in connection with the motion to dismiss and the motion for summary judgment that the mere fact that a conspiracy has existed between the defendants does not give the plaintiff any cause of action at all. It is elementary that in order that there be a cause of action there must be concerted action or other violation of the Antitrust Law, and as a result of that damage done to the plaintiff. Now, there were two items pleaded in the complaint as damage done to the plaintiff. One was the fraud order of 1925, and the other was the driving from the business as a result of the price cuts of June, 1929. Those were the specific things that caused damage. Those were the only [494] things that could give rise to a cause of action on behalf of the plaintiff against the defendants, and that cause of action accrued when the damage accrued, and the plaintiff cannot create out of thin air by a mere

allegation that a conspiracy was formed in 1929 a cause of action because he does not allege that any damage resulted from that. He alleges the only damage that resulted to him was the damage done from the price cut and the damage done from the fraud order.

Now, your Honor will remember that in connection with the motion to dismiss counsel talked about a continuing conspiracy, and the 1929 conspiracy, and I thought it was clear at that time that the conclusion had been reached that unless there was some item of concealment, the statute of limitations began to run as soon as the damage occurred. Now we are trying at the present time the question of whether the plaintiff had knowledge of the violation of the law to his damage between those two dates. And why did your Honor fix May 17th as the first date? Because the only act of concealment which is alleged in the complaint is the Zabriskie conversation of just that date. Of course, if that concealment operated to interrupt the statute of limitations, and if the plaintiff did not thereafter have any knowledge or cause to believe, and if he had a right to rely, then the statute might apply, but the concealment, your Honor will note, related solely to the price cuts of 1928. It had nothing to do with any conspiracy [495] of 1929, and the only question, therefore, presented now is, whether or not, in the first place, the plaintiff had a right legally to rely on the statement made by Zabriskie and, in the second place, whether or not after that time, and before 1939, he had a belief or cause to believe that he had a cause of

action. If he did not have a right to rely, or if at any time after that he had knowledge or cause to believe, then it necessarily follows as a matter of law, that this action is barred. I had understood that the case had proceeded so far that your Honor felt that your Honor was not quite ready to render summary judgment on the statute of limitations because there was this claim about the Zabriskie conversation, and there might perhaps be a vestige, or cloud, or a conflict of evidence or testimony as to the plaintiff's condition after that time. But up to that point it had been settled that there was no act of concealment as to Zabriskie's statement, and it certainly appears now, if it did not appear then, that Zabriskie's statement related not to any imaginary 1929 conspiracy, but to the concerted action of these defendants in 1928, which under the complaint was the thing which caused the plaintiff's business to shut down.

There are only two things alleged in the complaint which could possibly constitute a cause of action, because they are the only two things that are alleged to have damaged the plaintiff: [496]

No. 1, the fraud order in 1925; and No. 2, in 1928 when they cut the prices and drove him out of business. Now, then, if there had not been any concealment, if the Court please, we would have been entitled to a summary judgment on the defense of the statute of limitations, because three years after the damage occurred the cause of action would have been barred, but the claim is set up that a statement was made by Mr. Zabriskie in 1929, and then

the question arises, what statement did he make? If he made a statement, did the plaintiff have a right to rely upon it, and did the plaintiff, notwithstanding the statement, have knowledge or cause to believe during the succeeding years prior to the statutory period that a cause of action existed? But if we were trying here anything except concealment of the price cuts, then the whole question is wrong, and your Honor's prior rulings are wrong, and the plaintiff cannot convert something that does not constitute a cause of action, to wit, an allegation of some sort of conspiracy in 1929 that did not cause damage, into a cause of action simply by adding it in midair in the complaint. It is perfectly clear from the complaint it was only the alleged concerted action in 1925 and 1928 that caused the damage, that the cause of action, if it existed, arose at that time and not later, not by reason of any later facts; that three years after the cause of action arose it was barred unless the Zabriskie conversation could be relied upon, and the plaintiff [497] did not know or have cause to believe after that time, and it was because of those facts that your Honor settled the question as you did.

Your Honor will remember the question before the jury is whether or not the plaintiff knew or had cause to believe at any time between May 17th, 1929, and October, 1939, that it had been theretofore, that is, prior to May 17th, 1929, injured by the defendants as a result of their violation of the Antitrust Laws.

The Court: I do not think you have to labor that point, Mr. Harrison, because all the preliminary motions and argument had to do with that very subject.

Mr. Harrison: Yes, your Honor.

The Court: Mr. Carr submitted a number of authorities in his memorandum to the effect that where a defendant is guilty or is claimed to be guilty of fraudulent concealment of the cause of action, the statute of limitations does not operate until the aggrieved party discovers the existence of the cause of action.

Mr. Harrison: That was his claim.

The Court: That was the basis upon which the motion for summary judgment was argued and was the basis upon which the discussions were had in the matter of the submission of the special issue to the jury, and I see that in the complaint itself it is alleged in paragraph 75 that the damage to the [498] plaintiff occurred in 1928 and 1929, in the early days, and the plaintiff relied upon this conversation with Zabriskie in 1929. It is set forth in the complaint. That which is referred to there is not a conspiracy that thereafter took place but a conspiracy that had theretofore existed. [498-a]

It is very plain. That is the whole basis upon which all of the preliminary matters were presented to the Court in this case. Despite the fact that Mr. Carr seems to think I have been busy on other matters, I have a pretty clear recollection of the issues that were submitted in this case, and no one has ever suggested before that we are talking about

a conspiracy that occurred in 1929, that was concealed in 1929 as the result of a conversation with Mr. Zabriskie.

Mr. Carr: If it please your Honor, our answers to them are full of those contentions. We have always rested on the allegations of our complaint. Let me read you Paragraph 81:

“That all of the above acts done and performed by defendants or some of them have been in pursuance to and in furtherance of said conspiracy, plans and combinations hereinbefore in this complaint set forth and described and with the intent and purpose of controlling and dominating throughout the world and in interstate commerce the mining, production and the sale of borax in all of the various forms and products, and with the intent and purposes of injuring and destroying Plaintiff’s activities as herein set forth and removing Plaintiff as a competitor of defendants or some of them in said mining, production and selling of borax in all its forms; that due to said intents, purposes and acts of defendants plaintiff has been damaged in the sum of \$1,168,000,” and so [499] forth.

Now, what are the charges up here? The charges are the fraud order case, the price cut, the opposition, the forcing, the losing of our lease on Searles Lake, which we attribute to the defendants, and which occurred long after the 1929 conspiracy, and also the contest and fight over the Little Placer, their objections to our going ahead with the Little

Placer, all of which or the greater part of which occurred after 1929. It is true that in the fraud order case and in the price cuts and in some portions of the Little Placer some of those things existed prior to 1929, but many of them continued afterwards and, as I have said, have therefore come in, and we allege that in 1929, when this conspiracy was reduced to writing, they picked up and included within it all of the conspiracy——

The Court: Do you mean that they conspired to something that they had already done?

Mr. Carr: To carry on what they had started—not completed, because they did not complete our destruction until along in 1938, until we lost our Searles Lake lease and our property. Now, if under the charge of conspiracy we could not prove that damages from the fraud order and the price cuts occurred, any portions of them occurred to us after 1929, of course, we could not recover.

The Court: You are contending there were separate conspiracies then?

Mr. Carr: Yes, in a sense.

The Court: Either you are or you are not.

Mr. Carr: Let us say we are. We are contending in 1929 they made a conspiracy to put everybody out of business, all of the competitors.

The Court: Now, what they did to you after 1929 caused you to lose your lease?

Mr. Carr: Caused us to lose our lease and caused the reinstatement of the Postal fraud order. They caused us to lose our lease, our plant, also our physical plant in which we had invested a million dollars or more.

The Court: On that cause of action what concealment are you going to rely upon as to the 1929 conspiracy?

Mr. Carr: Well, the 1929 conspiracy, the same thing, and the evidence which your Honor rejected, which we believe should have gone in because it showed the intent and purpose of this conspiracy to secrete it and cover it up.

The Court: Yes, but how do you get at the statute of limitations, assuming you are claiming some damage because of acts committed subsequent to 1929 and pursuant to the 1929 conspiracy? What is the impact of the statute of limitations with respect to that matter? The Zabriskie conversation does not have anything to do with that, does it?

Mr. Carr: Yes, it does, because Mr. Burnham was induced at that time to believe that these people were acting lawfully and without conspiring—he testified he continued to believe Zabriskie right up to the end.

The Court: How could he believe Zabriskie as to a conspiracy which had not yet taken place?

Mr. Carr: Surely he could.

The Court: I do not follow that.

Mr. Carr: He testified he believed him when he said they did not conspire to cut the prices.

The Court: That might refer to the other conspiracies. We are now talking about the point you are making that you have a separate conspiracy for 1929.

Mr. Carr: That is the basis of our complaint.

The Court: That was entered into in 1929.

Mr. Carr: Yes.

The Court: And that the overt acts in connection with that are the final taking away of your lease in 1937, was it?

Mr. Carr: 1938.

Mr. Harrison: January, 1938.

The Court: January, 1938. Now, you filed your suit in 1945.

Mr. Carr: Yes, sir, your Honor.

The Court: Now the statute of limitations would run on that claim unless you have some fraudulent concealment of [502] that conspiracy. What have you alleged or shown in connection with that matter?

Mr. Carr: Well, the conspiracy was self-concealing of 1929 and we knew nothing about it.

The Court: You lost your property in 1937 and 1938?

Mr. Carr: Yes, your Honor.

The Court: There is testimony as to the witness Burnham's conversations and correspondence concerning that matter.

Mr. Carr: Yes.

The Court: So at the time you knew about it.

Mr. Carr: No, we didn't know about it.

The Court: You knew your property had been taken away from you; that is the damage you suffered at that time.

Now, you have to bring your action on that damage during the statutory period unless you are able to show that there was some fraudulent concealment that you did not have knowledge of.

Mr. Carr: He also has testified that he did not know of it, and the law supposes that a conspiracy is self-concealing. Your Honor has stated that on this trial. The law is that a conspiracy is self-concealing, and the various facts of the whole thing——

The Court: Of course, if it is self-concealing it would not make any difference. You could bring a suit fifty years [503] afterwards then.

Mr. Carr: What is wrong with that? Why should time cure fraud, deceit and dishonesty? Time only cures valid claims. It does not cure fraud. It does not run against fraud or deceit or concealment.

The Court: It does run after discovery.

Mr. Carr: Until discovery. It starts when the discovery comes, but fraud does not cure deceit and wrongdoing, and if it was fifty years, what is the difference? Why should the statute of limitations constitute a defense to fraud?

The Court: An action for damages under the Anti-Trust Law is not an action for fraud.

Mr. Carr: No, your Honor, but the fraud tolls the statute.

The Court: That is a new statutory right that is given you. It is not an action for fraud. The only fraud that is involved here is the issue that you have raised: Was there a fraudulent concealment?

Mr. Carr: It was, and we believe we have shown it.

The Court: That has nothing to do with the cause of action; that has to do with the tolling of the statute of limitations.

Mr. Carr: The tolling of the statute and, furthermore, we have another ground: It is a continuing conspiracy. Your Honor has never passed on that and we have not presented that [504] here for the reason that that is a question of law. No matter what happens here with this jury, your Honor was going to have to pass on, rather, we were going to ask you to pass on the question of the continuing conspiracy. Now, the Kissel case we believe absolutely in point, and the other cases involved there, and I would like to ask your Honor to express an opinion now without——

The Court: Let us assume you are right, Mr. Carr, and that you have a separate cause of action on what you claim to be is the 1929 conspiracy which resulted to your damage in 1938, and let us assume that we have a record here which discloses what was or was not done or happened after 1938 that would affect the timely presentation of the cause of action: What dispute as to the facts involved as to that particular portion of your complaint is there?

Mr. Carr: 1938 was not the only one. The Little Placer fight went on until the very end, and that would be enough to toll the statute, until the very end. The Little Placer claim is very valuable. That claim is worth over ten million dollars. It is one of the finest bodies of borax there is in the world. We fought for that, and they have resisted us all along and conspired in every way to prevent us, so if we had nothing left in the way of damages except the Little Placer, we would be all right. We would get a judgment, or I mean we could suffer damage far

in excess of [505] what we ask for. That fight never ended until the decision of your Honor in this case caused them to abandon their action in Washington to force the Department to give them the lease on the Little Placer. That continued up to the conclusion of that case, your Honor, and the damages were there. So that is in addition to there being a continuing conspiracy in the matter. No matter what happens here we will ask your Honor to pass on that continuing conspiracy under the reservation you made in your order that you would pass on the motions to dismiss subsequently to this. You held the motions in abeyance pending the determination of this case. With all due respect, I think the error and trouble arose from the form of your Honor's pre-trial order in fixing the dates.

The Court: Of course, if I were not to submit this matter to the Jury on the ground that there was no issue of fact to be considered by the Jury, and I decide it myself, I will decide the entire question as to whether or not the cause of action is barred by the statute of limitations, because, after all, that is the question the Court has to determine after a verdict of the Jury, if the question were presented to the Jury.

Mr. Carr: I do not think we would have any objection if your Honor wanted to withdraw the case and take it up for your own decision. We have no objection to that. We know [506] your Honor will decide it according to your best views.

The Court: Offhand, Mr. Carr, I am not going to decide this tonight, because I am going to take

it home with me and look at it some more, but my feeling in the matter is there is no question of fact to go to the Jury. I do not see what the Jury can decide in this case. I think it is up to the Court to decide on the undisputed testimony here whether as a matter of law there was or was not the knowledge here that makes this action untimely brought, and I think that is all there is involved in the case. I am not anxious to assume the burden of trying something that a Jury can decide. I assure you I have plenty of other things to do. But I have to determine that point as my conscience dictates, and if it is a question of law, I should not befuddle the Jury of trying to decide some questions that they could not properly decide.

Mr. Carr: We are not consenting at this time to any such——

The Court: I do not want you to waive anything. You asked for a jury and you are entitled to have a jury if there is a question of fact in the case.

Mr. Carr: This is an equitable case and it is in your Honor's discretion. I would like to make one more observation. Your Honor stated when we were discussing the presentation of the question and you thought I had made some [507] suggestions to you about the dates, I think if your Honor will look at Mr. Lasky's letter of December 12——

The Court: I had my file out in that matter, Mr. Carr. I did not mean that you had suggested those dates, but after Mr. Lasky had written me a letter suggesting this form of order, then you wrote me a letter, too, about the matter.

Mr. Carr: I think I wrote you giving you the Bear Film case, when your Honor on the argument requested both of us to present to you our respective suggestions, and your Honor said that then you would take both of those and work out a question.

Mr. Harrison: That is right.

The Court: I think in the case you were arguing that the matter was purely a question of knowledge and the other side were arguing that it was a question of belief.

Mr. Harrison: That is right.

The Court: So I wanted to give each side the benefit of his contention and make it real broad, and that was the reason why I said, "either knowledge or reasonable cause to believe," because I felt that that would be a broad enough catch-all to really do justice to the issue.

Mr. Carr: Another illustration of the unfortunate situation we get into by trying to please both sides. Thank you, your Honor.

The Court: I will take both motions for direction to [508] the Jury under advisement and decide them in the morning when the Jury comes in.

Mr. Carr: Will your Honor consider in so doing tonight the last instructions which we handed you this afternoon?

The Court: Yes, I will look at all the instructions.

Mr. Carr: And we would like to have at this time, so there will be no mistake about it, objections to all the suggested findings of fact presented by the defendants.

Mr. Harrison: You mean instructions.

Mr. Carr: Instructions.

Mr. Harrison: And similarly we have objections to the instructions proposed by the plaintiff.

The Court: If the case goes to the Jury I will make a note at the time, so you will all have whatever exceptions you want in that regard.

Mr. Harrison: In the event your Honor should deny these motions we will discuss then the time for argument.

The Court: Yes.

(Thereupon an adjournment was taken until tomorrow, April 3, 1947, at 10:00 o'clock a.m.)

Thursday, April 3, 1947, 10:00 o'Clock A.M.

The Clerk: Burnham Chemical Company vs. Borax Consolidated.

Mr. Carr: Ready.

Mr. Harrison: Ready.

Mr. Carr: Your Honor, may I present another requested instruction that we have?

The Court: Very well.

In this case the complaint was filed on July 3, 1945. By it the plaintiff corporation seeks to recover damages caused to it because of asserted violations by the defendants of the Sherman Anti-Trust Law, 15 U.S.C. Section 15. Subsequent to the filing of the complaint the defendants moved for a dismissal of the case and for a summary judgment in favor of the defendants for the reason, among

other grounds, that the action was barred by the statute of limitations. On September 20, 1946, the court, heeding the admonitions of our circuit court in cases of similar motions, denied the motion for summary judgment for the reasons stated in the order made by the court at the time, and principally for the reason that there might be a factual question in some way necessary to be decided in connection with the plea of the statute of limitations. The decision on the motion to dismiss was reserved at that time. The court ordered then that there be a special preliminary trial for the purpose of determining such factual issue as would be requisite for the determination by the court of the motion to dismiss upon the ground that the action was barred by the statute of limitations. The defendants then, as directed by the court, filed a special answer to the complaint setting up the statute of limitations as a special defense. Then the plaintiff moved to set the special issue for trial before a jury, and that motion was granted, and the case was set for trial before a jury for the purpose of determining such factual issue as might be necessary to aid the court in determining the plea of the statute of limitations.

After that was done, a pre-trial conference was held, and on January 16th the court made a pre-trial order by which it was directed that the special issue to be submitted to the jury shall be as follows:

“At any time from May 17, 1929 to October 10, 1939 did the plaintiff know or have good cause to believe that its business had been

theretofore damaged by acts of the defendants in violation of the Antitrust Laws of the United States?"

Upon the decision of this special question depends the court's determination of the plea of the Statute of Limitations.

The trial of this special issue was commenced on March 26th and continued on March 27th, March 28th, April 1st and [511] April 2nd, with presentation of evidence by both sides. The evidence was concluded yesterday, April 2nd. Only one witness testified in the case, the president of the plaintiff corporation, and all evidence on behalf of both the plaintiff and the defendants was elicited either from him or while he was on the witness stand.

The plaintiff, at the conclusion of the evidence yesterday, moved that the court direct the jury to answer the special inquiry in the negative. The defendants separately moved that the court direct the jury to render a verdict on the special issue in the affirmative. The court may and it should direct a verdict if the evidence is undisputed or if the evidence, even though it be conflicting, be so conclusive that the court, in the exercise of sound judicial discretion, should set aside a verdict in opposition to it. *Brady vs. The Southern Railway Company*, 320 U.S. 476; *Farr Company vs. Union Pacific Railroad*, 106 Fed. (2d) 437; *National Mutual Casualty Company vs. Eisenhower*, 116 Fed. (2d) 891; *Mutual Benefit Life Insurance Company vs. Snyder*, 109 Fed. (2d) 469; *Oklahoma Natural Gas Company vs. McKee*, 121 Fed. (2d) 583.

It appears to the court in this case that the evidence upon the issue now before the jury is undisputed. All of the evidence shows both knowledge and good cause to believe on the part of the plaintiff during the period specified in the special inquiry, that its business had been damaged by [512] acts of the defendants in violation of the Antitrust Laws. The statements of the president of the defendant corporation, who was the only witness in the case, that he had no knowledge or cause to believe, are opinions, and in the opinion of the court are therefore not proper evidence. However, even if the statements of the president of the corporation, who was the only witness, that he had no knowledge or cause for belief be considered as evidence, the court would still direct a verdict in the affirmative upon the special issue, because the evidence is so conclusive in favor of an affirmative answer upon the special issue that the court would set aside a negative reply by the jury to the special issue. Statements in writing and under oath by the witness Burnham, who was the managing president of the plaintiff, commencing in 1925 and continuing throughout the years to 1940, show without dispute a continued awareness and knowledge of the plaintiff's cause of action set out in the complaint. Not only that, but these writings make continuous claim as to the responsibility of the defendants for the loss and damage caused to the plaintiff's business. Consequently, no mere lip service to the contrary can rise to the dignity of creating a factual conflict for resolution by the trier of the fact. There has

been no evidence in the opinion of the court of any fraudulent representation or concealment by the defendants of the plaintiff's cause of action which deterred the plaintiff [513] from timely presentation of its claim in this court. The so-called Zabriskie and Enlaw conversations do not by any stretch of the imagination go beyond denials of the plaintiff's claim. In no sense do they reach the stature of fraudulent representations or concealment of such an affirmative nature as to in law be misleading to the plaintiff. Moreover, the evidence without dispute shows the plaintiff did not rely upon the statements made by these two men and hence there is no proof of any misleading character to be attributed to them.

One other matter requires comment by the court. I should like to make it abundantly clear that the court does not hold any brief for the defendants in the case. It would not be an unreasonable inference from the facts so far presented in this case, as well as from the court's judicial knowledge by virtue of the criminal and civil proceedings brought by the Government in this court, that the alleged acts and conduct of the defendants might well have caused the ruination of the plaintiff's business. But this court is not called upon to determine the merits of the case. Neither the judge nor the jury, if permitted to proceed to determine the case, are so concerned. I make this comment because there has been a contention made by the plaintiff that the plaintiff made every effort and used every diligent procedure at its command to endeavor to obtain what it

stated to be the necessary evidence [514] in connection with its asserted cause of action. However, the law does not excuse an untimely presentation upon the ground that the party asserting the claim has been unable to obtain others to aid in the presentation of the claim. The burden of presenting an asserted claim in a legal proceeding always rests upon the party who has and asserts it, and he may not excuse untimely presentation because he has been unable to enlist the aid of others in order to bring about adjudication in the court of his claim.

The plea of the statute of limitations is not a technical one. No court can disregard it because of a personal desire that someone may ultimately obtain recompense for an injury alleged to have been suffered. The statute of limitations plea is as much a component part of the scheme of administration of justice as is the theory that a just claim should be given consideration by a court. There are many reasons why claims must be timely presented. For the reasons the court has stated the plaintiff's motion for a directed verdict will be denied and the defendants' several motions will be granted.

Ladies and gentlemen, the decision which the court has just made will excuse the jury from any further consideration of the case. It sometimes happens that even though a jury has sat for a long time in hearing evidence in a case, as in this unusual case, it becomes necessary as a matter of law [515] for the court to make a decision which takes the case from the hands of the jury. Therefore,

because of the fact that the court has directed the decision in this matter, it will not be necessary for the jury to make any decision in the case. I wish to thank the members of this jury for their attention and attendance upon the trial of this case, and to assure the jury, even though you have not been called upon to make a decision in the case, you have nevertheless by your attendance in the case made your proper contribution as to this case. The jury may be excused at this time.

Mr. Carr: At this time may the plaintiff except to the denial of its motion? Your Honor has ordered a denial of its motion for a directed verdict. I also except to the order of your Honor granting the motion of the defendants for a directed verdict.

The Court: Very well. The record will so show.

Mr. Harrison: I assume, your Honor, no formal verdict is necessary?

The Court: I do not think so. The jury may be excused.

(Thereupon the jury were excused and retired from the courtroom.)

The Court: Inasmuch as the court has directed the verdict in this matter, Mr. Carr, I would like to ask you whether or not, before the court passes upon the motion to dismiss on the ground that the action is barred by the statute of [516] limitations, if you wish to have an opportunity to present any other ground in opposition to the granting of the motion.

Mr. Carr: I do, your Honor, upon the ground of a continuing conspiracy.

The Court: Would you like to present that in some formal manner, or would you like to make a statement so that the record may have what you have to say on that point?

Mr. Carr: Whatever your Honor prefers. The contention will be that this was a continuing conspiracy, and therefore the statute did not begin to run until the end of the Little Placer litigation, the last overt act under the conspiracy, until its termination, which was the dismissal by order of this court of the application for the Little Placer claim. I have not my authorities with me on that subject right now. If your Honor would prefer that we brief it, that is perfectly agreeable with me; whichever would be more convenient to your Honor.

The Court: I have heard the arguments generally. I just want to make sure there was nothing additional aside from the matters you have urged in connection with the matter now before the court, that there was anything additional that you had in mind to urge before the court made any formal order granting a motion to dismiss.

Mr. Carr: I could not say that, your Honor, now. I would like to review the whole situation before I say that. [517] We never went very fully into the question of the continuing conspiracy. That was mentioned, but we never argued it pointedly, and it was never brought to the attention of the court very pointedly. The contention was made, but I would like to present a formal argument on that question and possibly any other question that

might occur to us between now and the time of such argument. I would like to review this whole situation. I cannot do it in a moment.

The Court: I know that. What I had in mind particularly was, the court has now determined the question as a matter of law whether or not during the period of May 27, 1929, to October 10, 1939, the plaintiff knew or had cause to believe that its business had been damaged.

Mr. Carr: Yes.

The Court: The purpose of submitting that factual issue was to determine whether or not the motion to dismiss on the ground of the statute of limitations should be granted. I have determined that as a matter of law. Now, is there anything beyond that issue as to whether or not the plaintiff had knowledge or cause to believe within that stated period that its business had been damaged? Is there anything beyond that issue that would change the obvious result that the court should grant the motion to dismiss?

Mr. Carr: Yes, your Honor, if it was a continuing conspiracy you certainly should not grant the motion to dismiss. [518]

The Court: Just what do you mean by that?

Mr. Carr: Well, the law is, under the Kissel case, that where a conspiracy has been formed and a number of overt acts have continued, each overt act is a renewal of the conspiracy, and the statute does not begin to run until the termination of those so-called overt acts, and that is well established law, as we believe, and I want to present that. We

have never presented that very formally to your Honor. It was mentioned in our memos. We were relying more on this concealment provision and the question you presented here.

The Court: You mean there is another question as to whether or not the plaintiff had knowledge or cause to believe between 1939 and the time within which it would have had to file this suit?

Mr. Carr: No, your Honor, we believe the law is the conspiracy is what is known as a continuing conspiracy, and continued in force up until the termination of the last overt act, and that therefore the statute did not begin to run, irrespective of your Honor's dates indicated in your pre-trial order, until the termination of that last overt act. That is the Kissel case.

The Court: What do you contend would be the last overt act? You said 1937.

Mr. Carr: The Little Placer claim, when the claim for the Little Placer was terminated by order of this court sometime [519] after September, 1944.

The Court: I do not follow that. How did I terminate it? You mean this court?

Mr. Carr: Your Honor in your order directed that they dismiss their contest or application. They had a petition for mandamus, I believe it was, pending in the District Court of the District of Washington, to compel the Secretary of the Interior to issue them a lease upon the Little Placer. Now, that is all part of the conspiracy which we have charged here, and until the termination——

The Court: You are speaking of some provision of the equity decree?

Mr. Carr: Yes, your Honor, and until the termination of that overt act the statute did not begin to run as against the plaintiff in this action. We believe we can show many cases. As I say, we have not presented them. When this matter came along——

The Court: This is the first time you have made that specific point.

Mr. Carr: Oh, no, your Honor, we mentioned the fact of a continuing conspiracy.

The Court: I do not recall that my attention has ever been called before to the specific contention which you now make that irrespective of any of these other matters, that there is no question of the statute of limitations involved in [520] this case at all because of the fact that the last overt act was in 1944.

Mr. Carr: Yes, your Honor, this was a continuing conspiracy.

The Court: I know you have said that before, but I have never heard before the precise contention made that there is no question of the statute of limitations at all involved. Why did we have this question and spend all this time in the pre-trial discussing the form in which the special issue was to be presented to the jury, and there was no reference made, no argument to me that the statute was wholly inapplicable because of the fact that the statute did not begin to run until 1944?

Mr. Carr: No, but we did say when we presented our argument or memo in support of the instructions which we asked you to give the jury, we

referred to the contention that there was a continuing conspiracy, and that it was a question of law, your Honor, and not one for the jury. If you will examine that memo you will see such to be the fact. There can be more than one objection to the plea of the statute. Now, this one you have presented to the jury was a factual one. Your Honor fixed the dates, yourself, as to it, and which we, with all due respect, believed to be error, that that order was error in view of all the facts, and then in addition to that, even granting for the sake of argument—say [521] we were arguing on demurrer—even for the sake of argument——

The Court: Mr. Carr, I want to make myself clear on that: The dates do not make any difference to me, at all. If I were to decide right now the motion to dismiss on the ground of the statute of limitations, I would hold that at all times from 1925 on, whether it be a continuing conspiracy or whatever you call it, there was knowledge and good cause to believe, and therefore the action was not timely brought. Now, if you have an additional point that has nothing to do with knowledge or cause to believe that is based upon the ground that there is no necessity for the court and never was any necessity for the court to decide that question or to submit it to the jury because of the fact that the statute of limitations did not begin to run until the last overt act, which you claim was terminated by a court's order in the equity proceeding in 1944, that is a question we would have been better off to have heard and determined without going into all this

rigmarole of pre-trial conferences and working out a special issue and then submitting it to the jury. It was never presented to me in the form you are now presenting to me. What did we go through all of this for?

Mr. Carr: I do not know, your Honor.

The Court: You took part in it.

Mr. Carr: It is not a waiver of any of our rights because [522] if your Honor will be good enough to look at the memorandums we filed here, you will see we referred to the continuing conspiracy. We cited the Kissel case and one or two others.

The Court: But, Mr. Carr, you demanded a jury, if I remember rightly, to hear this factual question as to whether the cause of action was barred by the statute of limitations.

Mr. Carr: But not until after your Honor denied the motion and then said you would submit that factual question to the jury. Then when your Honor made the ruling, then we asked for a jury, but not before.

The Court: If I recall the argument, that was not any spark of genius on my part. As I recall, you argued as one of the grounds for denying the motion for summary judgment that there was a factual question that would have to be determined by a court or jury.

Mr. Carr: Yes, your Honor, there were two questions: The factual question and the question of the continuing conspiracy. Now, your Honor decided to place the factual one before the jury. You stated you would. But that was no abandon-

ment of our claim for a continuing conspiracy, and I would like very much, and we formally ask and request that your Honor set this matter for argument upon the continuing conspiracy question, and if you prefer that the matter be presented by briefs, we will be very glad to do so.

The Court: What have you got to say about this, Mr. Harrison? [523]

Mr. Harrison: If your Honor please, this question of continuing conspiracy was discussed by Mr. Carr at length upon the original argument of the motion to dismiss, and the claim was made then, as it is now, that because the conspiracy is alleged to have continued, therefore the statute never began to run presumably. Now, we relied in our briefs and in our argument upon the Foster & Kleiser case, which says very definitely in accordance with all the authorities that under the law of civil liability for violation of the Antitrust Law the material question is not whether the conspiracy is a continuing one, but when did the damage occur, and the statute begins to run immediately upon the occurrence of the damage, and that there can be recovered in the suit only the damages which have accrued legally as a result of the violation of the Sherman Antitrust Law within the statutory period before the action was taken; and in that Foster & Kleiser case the Circuit Court of Appeals for this district said that the Kissel case had no application whatsoever to a civil suit for damages. The Kissel case was a criminal case, and there was some talk there about a continuing conspiracy. As our Circuit Court of

Appeals pointed out, that has no application whatever to a civil case, and in a civil case the cause of action accrues at once, as soon as the damage occurs.

Now, the only damage that is alleged in the complaint by [524] the plaintiff, and it has been gone over many times, is the damage that resulted from the fraud order as a result of the cutting off of the subscriptions and the packaging business, and the damage which accrued in 1928 as a result of the price cuts. Those accrued at that time, and in the absence of some element of concealment, the statute would have run three years after the damage occurred.

Now, in the course of the oral argument upon the motion to dismiss, Mr. Carr at great length expatiated on the Kissel case, and upon the doctrine of continuing conspiracy. That was taken under submission by your Honor, and upon briefs filed, and as a result of your Honor's consideration of that and all the other questions, your Honor finally determined that there was one issue of fact which in your Honor's opinion ought to be decided before your Honor could finally pass upon the motion to dismiss, and not only was the matter of continuing conspiracy discussed at that time, but also this matter of the Little Placer, and your Honor indicated, if I remember correctly, very clearly that in your opinion the Little Placer claim had nothing to do with the cause of action of the plaintiff, because there was no allegation that the business of the plaintiff had been injured. The Little Placer claim

is set out at the end of the complaint without any relevance to the claim of damage to the plaintiff's business. The plaintiff's business, according to the allegations of the [525] complaint, had been destroyed long before anything of that kind occurred.

Now, the Little Placer claim furthermore is absolutely without merit for still another reason. The Little Placer claim is simply to the effect that there was a contest in the Land Office between the Pacific Coast Borax and the plaintiff here about who was entitled to a patent or a lease upon the Little Placer, and that was finally decided by the Department of the Interior that neither of them were and, of course, it is not a cause of action for a private litigant that the court has decided a matter or a tribunal has decided a matter adversely to a plaintiff, and upon that point it has been held by the Supreme Court of the United States in a decision that we cited, that where a person was injured by reason of the fact that unreasonable rates were charged by railroads pursuant to a conspiracy in violation of the Anti-trust Law, there could be no recovery because, as Judge Brandeis held, even if there had been a criminal violation of the law, the reasonableness of those rates was a matter confided to the Interstate Commerce Commission, and the fact that it had approved the rates was sufficient to preclude any private party from thereafter complaining of the decision of the tribunal.

Now, all that the plaintiff sets out is that the Department of the Interior, having the matter in charge, decided [526] the matter adversely to both parties, and we submit the tribunal being given the

power, the fact that it rendered its decision one way or the other cannot under any conceivable view of the law, produce any possible legal claim of damage resulting to the plaintiff. No damage is alleged in the first place; and in the second place, no damage could be alleged as a result of the decision of the Department of the Interior. The only business which the plaintiff had was, according to the allegations of the complaint, destroyed in 1925 and later in 1928 as a result of the two specific acts which the plaintiff accuses them of having done, to-wit, bringing about the fraud order and simultaneously cutting the price.

Now, then, in this Foster & Kleiser case I will read just two sentences which I think dispose of this Kissel case, and I read them before any argument:

“The statute, it is agreed, had run June 21, 1928. The trial court instructed the jury that if they should find the conspiracy continued up to June 21, 1928, and if they found that Foster & Kleiser performed acts in furtherance of such conspiracy on or since that date, they might in their verdict include all damages that were suffered by the appellee before June 21, 1928 that were the result of the operations of the appellant pursuant to the conspiracy. In support of this instruction the appellee cites *United States vs. Kissel*, where in a criminal prosecution brought against the defendants for a conspiracy punishable under the Sherman Antitrust Act, the Supreme Court held that the

applicable statute of limitations did not begin to run as long as the conspiracy continued, and that such conspiracy is a single offense.”

And then this court goes on to say:

“In a civil action for damages sustained because of a conspiracy in restraint of trade, the right of recovery is not based upon the conspiracy but upon the injuries resulting therefrom. The fact that there may be a criminal conspiracy does not give the plaintiff an action for damages under section 7 of the Antitrust Law,” citing decisions. “The gist of the action under this section is for injuries inflicted pursuant to the conspiracy for which the wrongdoer is liable. The cause of action arises from the damage sustained. The statute of limitations begins to run at that time. In *Bluefield vs. United Fruit*, the plaintiffs brought an action under the Sherman Antitrust Law to recover damages for injuries alleged to have been sustained in consequence of defendants’ creating an itself a monopoly in the banana business. It was there held that the statute of limitations began to run when the damage occurred.”

I am repeating what I said before, your Honor.

The Court: It now occurs to me. I must agree with Mr. [528] Carr to this extent: A great deal of water has gone over the judicial dam since I heard the arguments on the motion to dismiss. I recall now, after hearing what both of you have

said, these matters were discussed on the argument with respect to the motion to dismiss, and I think I have those before me. I will look them over again.

Mr. Carr: I ask your Honor that we be given an opportunity to submit additional authorities to those we presented before, because we have them, and there are cases.

The Court: I would not deny you that right, of course.

Mr. Carr: Any way your Honor wishes.

The Court: The record shows the motions to dismiss and the briefs that were filed at that time. Now, if you want to add to them, how much time would you want to add additional authorities?

Mr. Carr: Ten days.

The Court: Would you want to reply?

Mr. Harrison: Yes, your Honor.

Mr. Carr: May I have two weeks, your Honor? I have another case I have got to go into right away.

The Court: Say two weeks, fifteen days, and would you like a like period in which to reply, Mr. Harrison?

Mr. Harrison: Yes, your Honor.

The Court: Fifteen days to reply, and then the motions to dismiss will be submitted. [529]

Mr. Harrison: Before the motions are submitted, if the Court please, I have only this to say: The motions are based, so far as this particular branch of the case is concerned, upon the complaint, but we also introduced on behalf of our motion at the time it was originally heard certain affidavits,

so that if it were considered as a speaking motion they could be considered. Now, at the present time we should like to offer as additional documents in support of our motion certified copies showing the action taken by the Department of the Interior with respect to the Little Placer claim. Those are certified copies of judgment, July 22, 1927, and also order denying petition for rehearing on February 24, 1947, and we ask that those be considered as part of the motion, although I do not believe, your Honor, he will have to consider those.

Mr. Carr: What is that last date?

(Dates read.)

The Court: Very well. Both of those documents will be considered as offered in support of the motion. Then the motions to dismiss will be submitted on 15 and 15.

Mr. Carr: Yes, your Honor. [530]

Certificate of Reporter

We, Official Reporters and Official Reporters protem, certify that the foregoing transcript of 530 pages is a true and correct transcript of the matter therein contained as reported by us and thereafter reduced to typewriting, to the best of our ability.

/s/ J. J. SWEENEY,

/s/ F. J. SHERRY.

[Endorsed]: No. 11766. United States Circuit Court of Appeals for the Ninth Circuit. Burnham Chemical Company, a corporation, Appellant, vs. Borax Consolidated, Ltd., a corporation, Pacific Coast Borax Company, a corporation, United States Borax Company, a corporation and American Potash & Chemical Corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed Octobed 20, 1947.

/s PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the
Ninth Circuit

No. 11,766

BURNHAM CHEMICAL COMPANY,
Appellant,

vs.

BORAX CONSOLIDATED, LTD., et al.,
Appellees.

STATEMENT OF POINTS TO BE RELIED
UPON AND DESIGNATION OF PARTS
OF RECORD TO BE PRINTED

Appellant adopts as the statement of points upon which it intends to rely on this appeal the state-

ment of points filed in the above entitled action in the United States District Court for the Northern District of California, Southern Division, upon the 2nd day of August, 1947, and in addition thereto designates the following point:

7. The District Court erred in refusing to allow appellant to read to the jury the complaint on file in this action.

And Appellant Designates That there be printed the whole of the record now on file herein, save and except the original exhibits which, provided by order of this Court made herein upon the 27th day of October, 1947, might be considered in their original form and without reproduction.

/s/ STERLING CARR,

Attorney for Appellant.

Dated: November 18, 1947.

Received copy of the within this day of Nov., 1947.

BROBECK, PHLEGER &

HARRISON,

NEWLIN & ASHBURN,

Attorneys for Appellees, Borax Consolidated, Ltd.,
Pacific Coast Borax Company, and United
States Borax Company.

/s/ CHARLES A. BEARDSLEY,

Attorneys for Appellee American Potash & Chemical Corporation.

[Title of Circuit Court of Appeals and Cause.]

PETITION FOR ORDER RELIEVING APPELLANT FROM PRINTING EXHIBITS AND ALSO EXTENDING TIME FOR PAYMENT OF PRINTING FEES DUE CLERK OF THE ABOVE COURT

Now comes appellant above named, and by Sterling Carr, its attorney, respectfully states:

That the Record on Appeal in the above entitled case was docketed upon the 20th day of October, 1947. That such record consists of four volumes of Reporter's and Clerk's Transcripts and a large number of original exhibits introduced upon the trial of the above entitled cause in the District Court. That the estimated cost of printing the Record on Appeal, excluding such exhibits, is the sum of Sixteen Hundred and Ninety Dollars (\$1690.00); that said original exhibits are numerous in number and exceedingly long and it would be very expensive to print the same. That, in addition, the desired and important parts of such were in many instances read to the Jury and are set forth in the said Reporter's Transcript. Both counsel for appellees and counsel for appellant read to the Jury from the various exhibits, as introduced, the parts desired to be called to the particular attention of the Jury so the same appear as aforesaid in said Reporter's Transcript, and such portion will be printed in the Transcript to be used on this appeal and will be readily available upon the hearing of such appeal.

That at present the office of said appellant is in Reno, Nevada, where the President of said appellant resides; said appellant is not now engaged in active business and that it will be necessary for said President of appellant to collect from various parties the said Clerk's costs for the printing of said Transcript, and by reason thereof appellant requests to and including the 15th day of November, 1947 within which to make said payment of \$1690.00 to said Clerk of the above entitled Court.

Wherefore, petitioner respectfully prays that this Honorable Court make its order granting the two requests of appellant above set forth in this petition.

Respectfully submitted,

BURNHAM CHEMICAL
COMPANY,

By /s/ STERLING CARR,
Its Attorney.

[Title of Circuit Court of Appeals and Cause.]

Northern District of California,
State of California,
City and County of San Francisco—ss.

Sterling Carr, being first duly sworn, deposes and says:

That he is the attorney in the above entitled matter; that he has read the foregoing petition and

knows of his own knowledge that the facts therein stated are true and correct.

/s/ STERLING CARR,

Subscribed and sworn to before me this 24th day of October, 1947.

[Seal] /s/ LAURA E. HUGHES,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires March 4, 1950.

ORDER

Upon reading the foregoing petition and Good Cause Appearing therefor, It Is Hereby Ordered:

1. That appellant be relieved from having the exhibits referred to in said petition printed and reproduced in the Transcript, and that said exhibits may be considered in their original form without reproduction; and

2. That appellant may have, and it is hereby granted, to and including the 15th day of November, 1947, within which to pay to the Clerk of the above entitled Court the estimated costs of printing said Transcript referred to in said petition and amounting to the sum of Sixteen Hundred and Ninety Dollars (\$1690.00).

Dated: October 27, 1947.

/s/ WILLIAM DENMAN,

United States Circuit Judge.

[Endorsed]: Filed Oct. 27, 1947.

No. 11,766

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BURNHAM CHEMICAL COMPANY,

Appellant

vs.

BORAX CONSOLIDATED, LTD., PACIFIC COAST
BORAX COMPANY, UNITED STATES BORAX COM-
PANY, and AMERICAN POTASH & CHEMICAL COR-
PORATION,

Appellees.

**BRIEF ON BEHALF OF APPELLEE
AMERICAN POTASH & CHEMICAL CORPORATION**

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BURNHAM CHEMICAL COMPANY,
Appellant

vs.

BORAX CONSOLIDATED LTD., *et al.*
Appellees

STATEMENT

This is an appeal from a judgment dismissing the complaint, entered in the District Court of the United States for the Northern District of California, Southern Division, on May 9, 1947 (R. 199-200).^{*} The action was brought under Section 4 of the Clayton Act (U. S. C. Title 15 Section 15) for damages alleged to have been sustained by plaintiff as a result of a conspiracy by defendants in violation of the antitrust laws of the United States. The complaint alleged a conspiracy and overt acts of the defendants, or some of them, in 1925 and 1928 which caused it damage. This action was not brought until July 3, 1946.

The defendants moved to dismiss the action as barred by the three-year California statute of limitations, Section 338(1) of the Code of Civil Procedure. Affidavits were filed in support thereof (R. 76, 108-121, 163-180). After preliminary argument, the motions were, by direction of the court and stipulation of the parties, treated not only as motions

^{*}R.—refers to printed Transcript of Record.

Br.—refers to Appellant's brief.

For convenience appellant is referred to as "plaintiff" and appellees as "defendants".

to dismiss but also as motions for summary judgment, and further affidavits were filed (R. 105-107, 121-163, 180-182).

After argument on the motions, the District Court, while reserving decision on the motions to dismiss, stated that it felt compelled to deny the motion for summary judgment although "it would appear from the record here, that plaintiff may have great difficulty in producing credible evidence to defeat the defense of limitations" (R. 184).

The court ordered the defendants to file "Special answers, setting up the defense of the Statute of Limitations," which the defendants did. The plaintiff demanded a jury trial, and the court ordered a trial on the special issue (R. 185), following which it concluded that no dispute of fact had appeared (R. 782-783, 787-788, 803), and it granted defendants' motions for a directed verdict (R. 805). Judgment was entered dismissing the complaint on the ground that the action was barred by the statute of limitations (R. 196, 199-200).

Summary of Argument

The complaint sets forth allegations indicating an intention to state a claim for relief under the Sherman Act. Nowhere in the complaint is there any allegation indicating an intention to state any claim for relief other than the ordinary treble damage suit authorized by the federal antitrust laws.

The damage for which plaintiff seeks recovery in this suit was sustained from fifteen to twenty years previous to the bringing of the suit, and many of the persons concerned have since died (R. 659). Since the applicable period of limitations is three years, plaintiff has desperately attempted to devise a theory to avoid the bar of the statute.

In its efforts to overcome the patently correct decision of the District Court, dismissing the action, plaintiff resorts to several erroneous conceptions of the nature of its claim.

The plaintiff contends:

First, that this is a "civil action in equity" (Br. 2, 11, 39).

Second, that the conspiracy itself "was a fraud upon plaintiff" giving rise to a claim for relief for fraud (Br. 9).

Third, that the claim is based "on allegations of a continuing conspiracy among the defendants" (Br. 3, 7, 22, 32), and that its claim is based upon a conspiracy and not upon the overt acts which caused it damage (Br. 8).

Fourth, that the conspiracy was fraudulently concealed from it by defendants (Br. 6).

Based on the foregoing erroneous conceptions, plaintiff contends that (1) the time within which the suit must be commenced is not governed by any statute of limitations, but that the doctrine of laches is applicable (Br. 9, 36-39), and (2) if any statute of limitations is applicable, it does not commence to run until the completion of the last overt act which it contends did not occur until 1945 (Br. 9).

This defendant contends that:

1. The present action is not an action for equitable relief but an action at law for damages predicated upon a liability created by statute.
2. A conspiracy for violation of the antitrust laws does not give rise to either a suit in equity or an action based on fraud.
3. A civil action for treble damages under the antitrust laws is not based on a conspiracy.
4. The applicable statute of limitations is Section 338 Subdivision 1 of the California Code of Civil Procedure, and not Subdivision 4 thereof.
5. The causes of action accrued more than three years before the commencement of this action and are therefore barred by the statute of limitations.
6. There was no fraudulent concealment of plaintiff's cause of action which would toll the statute of limita-

tions. Furthermore, plaintiff failed to properly plead fraudulent concealment.

7. There was no error in the District Court's presentation of the special issue, nor in directing a verdict for the defendants.

In order that the real issues in the case, as determined by the District Court, may be clearly presented, it is first desirable to state the basic principles governing treble damage actions under the federal antitrust laws, which will clearly establish that plaintiff's conceptions are erroneous.

I.

A CIVIL ACTION FOR TREBLE DAMAGES UNDER THE ANTITRUST LAWS IS NOT BASED ON A CONSPIRACY.

The law is clearly established that a civil action for treble damages under the federal antitrust laws is *not* based upon the conspiracy. A conspiracy to restrain trade and commerce in violation of the antitrust laws does not in and of itself give rise to a private cause of action. Such right is based solely upon *damage* caused plaintiff pursuant to the conspiracy.

Nalle v. Oyster, 230 U. S. 165, (1913) ;
Alexander Milburn Co. v. Union Carbon & Carbide Corp., 15 F. (2d) 678, (C. C. A. 4th, 1926), cert. den. 273 U. S. 757;
Glenn Coal Co. v. Dickinson Fuel Co., 72 F. (2d) 885 (C. C. A. 4th, 1934) ;
Foster & Kleiser Co. v. Special Site Sign Co., 85 F. (2d) 742 (C. C. A. 9th, 1936), cert. den. 299 U. S. 613.

In *Glenn Coal Co. v. Dickinson Fuel Co.*, *supra*, the court said:

“A mere conspiracy with intent to violate the law while it may be the basis of a valid indictment under the criminal sanction of the Antitrust Act, does not give rise to a personal civil suit for damages.”

A plaintiff's right of action for violation of the Sherman Act is based not on the conspiracy, but on the acts causing him damage which are done pursuant to the conspiracy. As this Court stated in *Foster & Kleiser Co. v. Special Site Sign Co.*, *supra*, at pages 750-751:

“In a civil action for damages sustained because of a conspiracy in restraint of trade, the right of recovery is not based upon the conspiracy, but upon the injuries resulting therefrom. The fact that there may be a criminal conspiracy does not give a plaintiff an action for damages under section 7 of the antitrust law, 15 U. S. C. A. Section 15 note, *supra*. *Glenn Coal Co. v. Dickinson Fuel Co.* (C. C. A.) 72 F. (2d) 885; *Strout v. United Shoe Machinery Co.* (D. C.) 208 F. 646, 651. The gist of the action under this section is for injuries inflicted pursuant to the conspiracy for which the wrongdoer is liable. *Morris & Co. v. Nat'l Ass'n of Stationers* (C. C. A.) 40 F. (2d) 620.”

The following cases also illustrate these principles in civil actions for violation of the antitrust laws:

Alexander Milburn Co. v. Union Carbon & Carbide Corp., *supra*;

Momand v. Universal Film Exchange, 43 F. Supp. 996, 1007 (D. C. Mass. 1942).

In Point V (Br. 32-36) plaintiff contends that the complaint charged a continuing conspiracy, and it cites several cases which discuss *criminal* conspiracies. The authorities cited above show the irrelevancy of the entire argument under this point. It is immaterial whether there was a continuing conspiracy which the government could prosecute, as a private party obtains no rights thereby. The mere fact that the conspiracy may have continued subsequent to the

time of the alleged damage does not toll the statute, nor extend the time within which the action must be brought.

The contention that a treble damage suit was not barred because the conspiracy alleged was a continuing conspiracy under the rule of *U. S. v. Kissel*, 218 U. S. 601 (1910), was made to this Court in the *Foster & Kleiser* case, and conclusively disposed of. This Court correctly pointed out that the *Kissel* case was a criminal prosecution, and that in a civil action for damages sustained because of a conspiracy in restraint of trade, the right of recovery is not based on the conspiracy, but on the injuries resulting therefrom.

In *Momand v. Universal Film Exchange*, *supra*, the court, citing with approval the *Foster & Kleiser* case, said at page 1006:

“But the situation is different where, as here, the plaintiff alleges that the defendants have continuously until the date of the trial, violated the anti-trust laws and those continuous violations have at different times invaded the plaintiff’s legally protected interest. . . . Each time the plaintiff’s interest is invaded by an act of the defendants, he has a new cause of action.”

The court went on to point out that in view of these principles plaintiff’s allegation that the conspiracy continued up to the date of the filing of the complaint was not controlling and said:

“Even though ‘a conspiracy . . . is in effect renewed during each day of its continuance’ . . . no private civil cause of action accrues from the mere conspiracy itself because standing alone a conspiracy does not invade any private rights . . . Thus, *in private suits the existence of the conspiracy as such is not the critical question in computing the period of limitation* . . . The critical question is on what date or dates the defendants invaded the plaintiff’s interest . . .” (Italics ours)

In *Twin Ports Oil Co. v. Pure Oil Co.*, 46 F. Supp. 149 (D. C. Minn. 1942) at 152, it was said:

“At the outset, it must be recognized that, in every violation of the Sherman Act, there is no legal or logical inference that someone has sustained recoverable damages in a civil action. A conspiracy under the Act may afford the Government the right to injunction or to the prosecution of criminal proceedings, but it does not necessarily follow that everyone who did business with the conspirators during the period were damaged, so as to enable them to recover in a civil proceeding.”

Plaintiff complains that the District Court “ignored the conspiracy of 1929 which is the sole and exclusive cause of action relied upon,” and changed it to “several other causes of action based upon the overt acts alleged” (Br. 8).

In so ruling the District Court was following the law that in private actions under the antitrust laws the plaintiff has no cause of action unless it has been damaged by an overt act or acts done by defendants pursuant to the conspiracy.

Nalle v. Oyster, supra;

Alexander Milburn Co. v. Union Carbon & Carbide Corp., supra;

Glenn Coal Co. v. Dickinson Fuel Co., supra;

Foster & Kleiser Co. v. Special Site Sign Co., supra.

II.

A CONSPIRACY IN VIOLATION OF THE ANTITRUST LAWS DOES NOT GIVE RISE TO EITHER A SUIT IN EQUITY OR AN ACTION BASED ON FRAUD.

In a further effort to avoid the bar of the statute of limitations, plaintiff contends that the “1929 conspiracy was a fraud upon plaintiff” (Br. 9). By pleading fraud and claiming ignorance of the fraud, it attempts to bring the case within the rule that the statute of limitations does not begin to run on an action for fraud until it is discovered (Br. 20-21). This very point was specifically decided in the *Foster &*

Kleiser case, *supra*, where this Court held that the gravamen of an action brought under the provisions of the Sherman Act was not fraud.

Another case which also clearly holds that the gravamen of a cause of action under the Clayton Act and Sherman Act is not fraud is *State of Oklahoma v. American Book Co.*, 144 F. (2d) 585, 587 (C. C. A. 10th, 1944), in which the court said, at page 587:

"The action in behalf of private persons was to recover treble damages under the Federal Antitrust Act. It was predicated upon a liability created by statute. . . . The period of limitations for such an action is three years The running of the statute was not tolled by the non-discovery of the claim. *The claim was not one for fraud within the meaning of 12.O.S. 1941 Section 95 (3).*" (Italics ours.)

Plaintiff cites no authorities to support its mere assertion that its cause of action is "in equity". For more than 50 years it has been settled that private actions arising under the Sherman Act are actions at law and not suits in equity.

In *Fleitmann v. Welsbach Co.*, 240 U. S. 27 (1916), the question was whether an action to recover treble damages was an action in equity or at law. The court, speaking through Mr. Justice Holmes, said (pp. 28, 29):

". . . we agree with the courts below that when a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law. On the contrary it plainly provides the latter remedy and it provides no other."

See also *Williamson v. Columbia Gas & Electric Co.*, 110 F. (2d) 15 (C. C. A. 3rd 1939) *cert. den.* 310 U. S. 639 (1940). Treble damage suits being actions at law, the parties have a right to a trial by jury. *Meeker v. Lehigh Valley R. Co.*, 162 Fed. 354 (C. C. N. Y. 1908); *Columbia River Packers Assn. v.*

Minton, 34 F. Supp. 970 (D. C. Oregon 1940), rev'd on other grounds 117 F. (2d) 310, rev'd on other grounds 315 U. S. 143; *Farmers Co-operative Oil Co. v. Socony Vacuum Oil Co.*, 43 F. Supp. 735 (D. C. Iowa 1940), modified on other grounds 133 F. (2d) 101.

Despite this clear and unambiguous series of holdings, the plaintiff has attempted, by use of the word "fraud", to place this case on a different footing from other treble damage suits. It hopes by the use of the word "fraud" in the complaint to transform an action at law into an equitable action. It overlooks the rule that the test is the type of relief demanded—a suit for damages is a suit at law even though the cause of action be fraud. See the excellent discussion on this point in *Philpott v. Superior Court*, 1 Cal. (2d) 512, 36 P. (2d) 635. The plaintiff itself has never been very clear as to the nature of its action. Its counsel admitted in argument below that an action for damages under the antitrust laws was not an action for fraud (R. 795).

The case upon which plaintiff principally relies on this appeal, *Holmberg v. Armbrrecht*, 327 U. S. 392 (1946), was a class suit to enforce an equitable right given by a federal statute, viz., double liability of bank stockholders (Br. 9, 37). The class suit was a remedy available only in equity [See *Wheeler v. Greene*, 280 U. S. 49 (1929); *Christopher v. Brunsellback*, 302 U. S. 500 (1938); *Russell v. Todd*, 309 U. S. 280, 285 (1940)]. Not only is the *Holmberg* case obviously irrelevant, but the Court in its opinion, at p. 395, specifically cited a treble damage suit under the antitrust laws, *Chattanooga Foundry and Pipe Works v. Atlanta*, 203 U. S. 390 (1906), as the type of case about which it was *not* talking. That type of case, said the Court, is governed by the applicable state statute of limitations.

The authorities cited above under Point I indicate the true nature of the cause of action. The District Court correctly ruled that the action was not based on fraud (R. 795).

III.

THE THREE YEAR STATUTE OF LIMITATIONS SET FORTH IN SECTION 338, SUBDIVISION 1 OF THE CALIFORNIA CODE OF CIVIL PROCEDURE IS APPLICABLE.

Plaintiff makes the preposterous contention that *no statute of limitations at all* is applicable to its suit (Br. 36-39). It contends "that the state statute of limitation has no application to the instant case" (Br. 11, 36); "There is no federal statute of limitations applicable" (Br. 37); "it was an error of the Court to apply the statute of limitations" (Br. 38); and "The doctrine of laches is therefore applicable" (Br. 39). No cases arising under the antitrust laws are cited, and the cases which plaintiff does rely upon are not even remotely relevant.

The antitrust laws of the United States do not contain any statute of limitations. In such cases it is settled law that the applicable statute of limitations is that of the state where the federal district court in which the action is brought is situated.

Chattanooga Foundry and Pipe Works v. Atlanta, supra;

Foster & Kleiser Co. v. Special Site Sign Co., supra;

Bluefields S. S. Company v. United Fruit Company, 243 Fed. 1 (C. C. A. 3rd, 1917) writ of error dismissed 248 U. S. 595;

Ben C. Jones & Co. v. West Publishing Co., 270 Fed. 563 (C. C. A. 5th, 1921) writ of errors dismissed 270 U. S. 665;

State of Oklahoma v. American Book Co., supra;
Momand v. Universal Film Exchange, supra.

The California Code of Civil Procedure provides in part as follows:

Section 312:

“Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute.”

Section 335:

“The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:”

Section 338:

“Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture. . . .”

The causes of action set forth in the complaint are based upon the provisions of the Sherman Act, and it is this statute which gives plaintiff its alleged claims for relief for treble damages.

This Court has specifically held in the *Foster & Kleiser* case that in an action to recover treble damages under the Sherman Act

“The applicable statute of limitations is section 338, subd. 1, Cal. Code Civ. Proc. which provides for a three-year limitation upon a claim based upon a statutory liability.” (p. 750)

The Circuit Court of Appeals for the 10th Circuit and the district courts in New York and Massachusetts have also held that actions under the Sherman Act are actions “upon a liability created by statute” within the meaning of these words in a state statute.

State of Oklahoma v. American Book Co. supra;
Hansen Packing Co. v. Swift & Co. 27 F. Supp.
 364, 367 (D.C. S.D. N.Y. 1939) ;
Momand v. Universal Film Exchange, supra.

It follows, therefore, from the provisions of section 312 and section 338, subdivision 1, of the Code of Civil Procedure, that plaintiff's cause of action is barred unless it was commenced within three years after the cause of action accrued.

Nowhere in its brief does plaintiff discuss the applicable statutes or the cases above cited, although they were cited to the District Court and relied upon in its decision.

IV.

THE CAUSES OF ACTION ACCRUED MORE THAN THREE YEARS BEFORE THE COMMENCEMENT OF THIS ACTION AND ARE THEREFORE BARRED BY THE STATUTE OF LIMITATIONS.

Under federal law it is very clear that a cause of action for damages for violation of the Sherman Act accrues when the damage is sustained by the plaintiff. As stated in the *Foster & Kleiser* case, *supra*, at page 750:

"The cause of action arises when the damage is sustained and the statute of limitations begins to run at that time. Bluefields S. S. Co. v. United Fruit Co. (C. C. A.) 243 Fed. 1, 20."

"Under this decision, in a civil action for damages under the Sherman Anti-Trust Act, a plaintiff may recover only such damages as have been sustained within the applicable period of limitations immediately preceding the filing of the action." (*Italics ours*).

The cause of action here accrued not later than January 1929, or sixteen and one-half years before suit was brought. This suit was filed July 3, 1946.

Plaintiff's alleged cause of action is predicated on damage allegedly suffered on two occasions.

First, in 1924 and 1925, when defendants allegedly conspired to have the Post Office Department issue an order preventing the plaintiff from using the mails (Complaint para. 73); second, in 1928, when defendants pursuant to the conspiracy allegedly reduced the price of borax below plaintiff's costs of production, as a result of which plaintiff was allegedly driven out of business at the end of 1928 or in January 1929 (Complaint paras. 73, 76).

In this case the acts from which the plaintiff alleges it sustained damages occurred in 1925 and 1928, respectively. Its plant closed down in 1929. Under the *Bluefields* case, the statute would have begun to run in 1928.

The "overt act" alleged as the defendants' opposition to plaintiff's attempt to secure a lease on the so-called "Little Placer" claim is not alleged as a source of damage to the plaintiff. The only damage claimed is that itemized in paragraph 76 of the complaint.

No damages could have resulted from the action of the Department of the Interior in denying the plaintiff a lease on the "Little Placer" claim, for the decision of a government official acting within the scope of his powers is an act of the sovereign and cannot be unlawful. In *American Banana Company v. United Fruit Co.*, 166 Fed. 261 (1908), the court dismissed a treble damage suit under the antitrust laws wherein it was alleged that Costa Rican officials had been instigated by the defendant to do certain acts damaging to the plaintiff. In affirming the judgment, *American Banana Company v. United Fruit Company*, 213 U. S. 347 (1909), the Supreme Court, per Mr. Justice Holmes, said:

"The fundamental reason why persuading a sovereign power to do this or that cannot be a tort is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper . . . It makes the persuasion lawful by its own act."

The case of *Buckeye Powder Co. v. du Pont de Nemours Powder Co.*, 248 U. S. 55 (1918), is particularly in point. In that case the lower court had held that there could be no recovery for damage suffered more than six years before the beginning of the suit, September 18, 1911, even though the government had secured an injunction against the conspiracy as a continuing conspiracy in June 1911 (188 Fed. 127 (C. C. D. Del. 1911)). The Supreme Court affirmed, dismissing the plaintiff's contentions in a summary opinion by Mr. Justice Holmes.

The fact that the conspiracy may have continued in so far as government indictment was concerned does not give Burnham an action for damage suffered long before, any more than it did the plaintiff in the *Buckeye* case. He had the option of suing before the statute of limitations expired, and employing a bill of discovery to secure his evidence. *Loft, Inc. v. Corn Products Refining Co.*, 103 F. (2d) 1 (C. C. A. 7th, 1939), cert. den.; *Corn Products Refining Co. v. Loft, Inc.*, 308 U. S. 558 (1940); *Baush Machine Tool Co. v. Aluminum Co. of America*, 63 F. (2d) 778 (C. C. A. 2d. 1933), cert. den. 289 U. S. 739 (1933). If the plaintiff chose to use its funds in complaining to other authorities than the courts of the United States (R. 661), it cannot now complain.

Since the cause of action is not based upon the conspiracy, the statute runs from the date the damage was sustained, or from the date of the last overt act causing that damage to the plaintiff, whichever first occurs. *Momand v. Universal Film Exchange*, *supra*. It follows that the cause of action accrued not later than 1929, and is barred by the statute of limitations.

The contention that the complaint alleged a continuing conspiracy, and that neither laches nor the statute of limitations began to run until completion of the last overt act in 1945 is untenable (Br. 9). It has already been demonstrated that plaintiff's cause of action is not based upon the conspiracy. And there is no contention or allegation that plaintiff was damaged by any overt act after 1929.

V.

SECTION 338(4) OF THE CALIFORNIA CODE OF CIVIL PROCEDURE IS NOT APPLICABLE.

Without surrendering its contention that no statute of limitations at all is applicable, plaintiff contends that (a) the conspiracy was a fraud upon it, (b) which was fraudulently concealed by the defendants, and that neither the statute of limitations nor laches began to run until its discovery of the existence of the conspiracy (Br. 9, 38). Plaintiff contends that if any statute of limitations is applicable, it is Section 338(4) of the Code of Civil Procedure (Br. 17).

Section 338(4) reads as follows:

“Within three years . . .

An action on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until discovery, by the aggrieved party, of the fact constituting the fraud or mistake.”

As pointed out above, this Court specifically stated in the *Foster & Kleiser* case, *supra*, that Section 338(4) is not applicable to a treble damage suit.

VI.

THE DISTRICT COURT CORRECTLY HELD THAT THE PLAINTIFF FAILED TO PROVE THE CHARGE THAT ITS CAUSE OF ACTION HAD BEEN FRAUDULENTLY CONCEALED BY THE DEFENDANTS.

The defendants moved to dismiss on the ground that the action was barred by the statute of limitations (R. 55, 72, 89, 95). After a trial on the special issue the District Court directed a verdict for the defendants (R. 196, 806) and

granted the motions to dismiss (R. 199). The Court held that the plaintiff had a continued awareness and knowledge of its cause of action from 1925 to 1940 (R. 803).

1. Defendants owed no duty to plaintiff to disclose to it the existence of the alleged conspiracy.

Since Section 338(4) is not applicable, cases cited by plaintiff on the question of "discovery" of fraud are irrelevant. However, the California Courts have held that where defendant has "fraudulently concealed" from plaintiff the facts upon which the cause of action depends, the running of the statute of limitations is suspended until plaintiff discovers the facts or until he has knowledge of facts sufficient to put a reasonably prudent person on inquiry.

Kimball v. Pacific Gas & Electric Co. 220 Cal. 203, 30 P. (2) 39 (1934) ;

Pashley v. Pacific Electric Company, 25 Cal. (2) 226, 153 P. (2) 325 (1944) ;

Bollinger v. National Fire Insurance Co. 25 Cal. (2) 399, 154 P. (2) 399 (1944) ;

Hobart v. Hobart Estate Co. 26 Cal. (2) 412, 159 P. (2) 958 (1945) ;

Hansen v. Bear Film Co. 28 Cal. (2) 154, 168 P. (2) 946 (1946) ;

Bowman v. McPheeters, Cal. App. 175 P. (2) 745 (1947).

The California cases also hold, however, that mere failure by a defendant to disclose to plaintiff the existence of the facts upon which the cause of action is based, does not constitute "fraudulent concealment" of the cause of action unless defendant is under a duty to disclose these facts.

Pashley v. Pacific Electric Co. *supra* ;

Kimball v. Pacific Gas & Electric Co., *supra*, (p. 45).

See also *Bryan v. United States*, 99 F. (2d), 549, 553, (C. C. A. 10th, 1938) cert den. 305 U. S. 661, and cases cited therein at note 11.

The plaintiff bases its contention that its cause of action was fraudulently concealed on two conversations of Burnham in 1929, one with the late C. B. Zabriskie, general manager of Pacific Coast Borax, and the second with H. S. Emlaw, president of American Potash & Chemical Corporation, in which, according to Burnham's statement, each of them denied that the defendants had conspired to cut prices on borax in 1928, with the intention of putting the plaintiff out of business (R. 359, 362). Burnham testified that the denials of Zabriskie and Emlaw dispelled his belief that he had a cause of action but the District Court found that this testimony could not carry any weight when opposed to the mass of evidence to the contrary (R. 803-804).

The District Court very correctly took the attitude that a mere denial of a tort is not fraudulent concealment thereof such as will toll the statute of limitations. Here there was no relationship between the plaintiff and the defendants, or any other special facts which would place the defendants under the duty of disclosing their corporate transactions. Thus there existed a relationship of physician-patient in *Bowman v. McPheeters*, *supra*, and *Pashley v. Pacific Electric Co.*, *supra*; of administratrix-heir-at-law in *Hansen v. Bear Film Co.*, *supra*; and of employer-employee in *Kimball v. Pacific Gas and Electric Co.*, *supra*.

When defendant has merely failed to disclose to plaintiff the existence of the cause of action, as defendants are alleged to have done in this case, his duty to disclose will arise only if there exists a confidential relationship between plaintiff and defendant which relationship imposes on defendant the duty of disclosure.

Scafidi v. Western Loan and Building Co. 72 Cal. App. (2) 550, 165 P. (2) 260 (1946);

Strout v. United Shoe Machinery Co. 208 Fed. 646 (D.C. Mass. 1913).

When, however, there is no such special relationship between the parties as to impose upon defendant the duty of disclosing the facts upon which the cause of action is based, then the statute is not suspended merely by reason of plaintiff's ignorance of, or failure to discover, the existence of the cause of action.

Lattin v. Gillette, 95 Cal. 317, 30 P. 545 (1892);
Lambert v. McKenzie, 135 Cal. 100, 67 P. 6 (1901);
Medley v. Hill, 104 Cal. App. 309, 285 P. 891 (1930);
Scafidi v. Western Loan & Building Co., *supra*;
Neff v. National Life Insurance Co., 30 Cal. (2) 161, 180 P. (2) 900 (1947).

In the *Foster & Kleiser* case, *supra*, this Court stated, at p. 752,

"... when fraud is not the gravamen of the action, in order to toll the applicable statute of limitations, two factors must be present: (1) Fraudulent concealment; (2) non-discovery, that is, absence of facts that would put a party upon notice of the cause of action. Mere ignorance of the injury complained of, or of the facts constituting such injury will not prevent the running of the statute".

2. Plaintiff failed to properly allege fraudulent concealment.

Even if the theory of fraudulent concealment could be applied to a treble damage suit under some conceivable circumstances, the complaint alleges no facts which make it applicable to these causes of action. The sole allegations are the *conclusions* (1) that the defendants "fraudulently concealed" from plaintiff its cause of action, and (2) that the plaintiff did not "discover" this fact until the Government instituted suits.

In order to prevent the running of the statute of limitations plaintiff must *plead* and prove facts establishing fraudu-

lent concealment; the fraudulent concealment must be of facts upon which the existence of the cause of action depends; *facts* must be alleged from which the court may conclude the date of "discovery"; and plaintiff must allege *facts* which establish that they could not have made the "discovery" earlier by the exercise of ordinary diligence.

Vertex Investment Co. v. Schwabacher, 57 C. A. (2d) 406, 134 P. (2d) 891, (1943);

Lady Washington Consolidated Co. v. Wood, 113 Cal. 482, 486, 45 P. 809 (1896);

Wood v. Carpenter, 101 U. S. 135, 140 (1879);

Johnson v. Ehrgott, 1 Cal. (2d) 136, 34 P. (2d) 144, (1934);

Myers v. Metropolitan Trust Co., 22 C. A. (2d) 284, 70 P. (2d) 992, 1937).

The only allegation of fraudulent concealment in the complaint which could be relied on by the plaintiff on this appeal is the charge in paragraph 75 that in May 1929, Mr. Zabriskie denied that the defendants had conspired to cut prices on borax in 1928 with the intention of putting plaintiff out of business, and that these assurances dispelled his belief that he had a cause of action.

In *Feak v. Marion Steam Shovel Co.*, 84 F. (2d) 670 (C. C. A. 9, 1936), cert. den. 299 U. S. 604 (1936), the court stated:

"Restatements of the fraudulent representation do not of themselves constitute concealment, and *where a party is once put upon notice of fraud he cannot avoid the consequences of his constructive knowledge of the fraud nor fulfill his duty to investigate by going to the party he suspects of the fraud. He cannot desist from further investigation because he is reassured of the truth of the original representations.* Brackett v. Perry, 201 Mass. 502, 87 N. E. 903; see also *Sioux City & St. P. Ry. Co. v. O'Brien* (1902) 118 Iowa 582, 92 N. W. 857." (italics ours)

To the same effect, that after a person suspects that a wrong has been perpetuated on him, he cannot stop the running of the statute by going to the alleged wrongdoer and obtaining assurance that no wrong was committed, see

Turman v. Holmes, 29 C. A. (2d) 198.

The only allegation in the complaint upon which the plaintiff predicates its claim of "discovery" of its cause of action is the commencement of actions by the Government against these defendants on September 14, 1944. Consequently, the only *fact* which the plaintiff has to rely on is that the Government *accused* the defendants of violating the antitrust laws. This did not provide the plaintiff with any greater means of discovery than it apparently possessed at the time Burnham made his inquiry of Mr. Zabriskie.

The rules requiring diligence of "discovery" and necessity of pleading facts of "non-discovery" apply not only to "fraud" which is the gravamen of a cause of action but equally well to alleged concealment. *Foster & Kleiser Co. v. Special Site Sign Co.*, *supra*. The alleged statement by Mr. Zabriskie was made, so the complaint says, in May 1929. Sixteen years elapsed between that date and filing of suit. Yet plaintiff alleges no facts whatever why it did not discover alleged falsity of the statement during that period. Indeed, it does allege (para. 73, p. 34, l. 13) that after 1929 defendants increased the price of borax, a circumstance apparently inconsistent with Mr. Zabriskie's alleged statement, and a circumstance which ought to have renewed the original suspicion.

3. There Was No Error in the District Court's Ruling Directing a Verdict for the Defendants.

We submit that the District Court, in framing the question to be considered at the special trial, fairly summed up the California rule when it put it as follows:

"At any time from May 17, 1929, to October 10, 1939, did plaintiff know or have good cause to believe

that its business had been theretofore damaged by acts of the defendants in violation of the Anti-Trust Laws of the United States?"

"Know or have good cause to believe" is a fair statement of the state of mind required to bar the plaintiff, elsewhere described as being "put on notice of the cause of action", "by reasonable diligence . . . should have discovered the facts", "actual or presumptive knowledge of facts sufficient to put him on inquiry". Indeed, if anything the District Court's formulation in this case was more favorable to the plaintiff than it should have been.

Foster & Kleiser Co. v. Special Site Sign Co., supra;

Original Mining and Milling Co. v. Casad, 210 Cal. 71; 290 P. 456-457;

Kimball v. Pacific Gas & Electric Co., supra.

The evidence presented at the special trial established no dispute of facts; therefore the District Court properly directed a verdict for the defendants.

The testimony of the witness Burnham on cross-examination showed that as early as 1926, the plaintiff, in a complaint filed by it against the postmaster at Reno, Nevada, alleged that these defendants exercised a "monopolistic restraint of the commerce in borax" which "was and is a flagrant violation of the laws of the United States, and could and should be prohibited by criminal and civil proceedings instituted by the United States" (R. 420), and further alleged that the Post Office Department "Fraud Order" which hampered the plaintiff's financing was obtained as part of the conspiracy to restrain trade. Burnham had been informed by certain of his stockholders that the "Fraud Order" had been inspired by his competitors (R. 429-432). Even earlier, in 1923, Burnham had written to the Post Office inspector investigating the Burnham company, alleging that the defendants were attempting to hinder its development (R. 453-454), and declining to furnish a list of its stockholders because of the "active

oppositon" interested in preventing the success of the enterprise (R. 458).

The allegation of the plaintiff in this action that the "Fraud Order" was inspired by a Pacific Coast Borax official then in the service of the Federal Government was based on knowledge acquired in 1926 (R. 482) and was also included in a letter to the Secretary of the Interior in 1939 (R. 487). Burnham believed in 1929, at the time of his conversation with Mr. Zabriskie which he alleges was a concealment of his cause of action, that the official had inspired the "Fraud Order" for the benefit of the defendants (R. 499-500).

As to the price cuts instituted by the defendants in June, 1928, which the plaintiff alleges drove it out of business, one of its attorneys wrote in July, 1928, that he was inclined to think that the price competition was "in fact designed by the controlling heads of these two concerns (and which are located in England) for the express purpose of killing off threatened competition" (R. 511). In a memorandum to Burnham, based on thorough research, this attorney concluded that it was "quite evident" that the price reductions were the "natural and inevitable result, and therefore the very object and purpose, of trade practices which are in violation of the Federal Trade Commission Act, also the Federal Anti-trust Laws" (R. 519).

The plaintiff wrote to its stockholders expressing the opinion that the price cuts of 1928 were intended to drive it out of business (R. 524-525), and wrote to Pacific Coast Borax Co. proposing that the latter assist it in suing American Potash and Chemical Corporation (R. 532). The refusal of Pacific Coast Borax to assist in such a suit "added belief or suspicion" in Burnham's mind that the two companies were cooperating to cut the price and drive Burnham out of business (R. 535).

Burnham continued throughout the 1930's to entertain his belief that the defendants were conspiring against him. In 1933, the denial of his application for a lease of borate lands "led him to believe" that probably defendants or some

of them were violating the anti-trust laws (R. 574). In 1934 further purchases of borax property by Pacific Coast Borax stimulated him to look into the possibility of complaining to Congress (R. 574-581), and his attorney wrote to a Department of the Interior investigator about the "evil and strangling monopoly" established by Pacific Coast Borax (R. 585). In 1936 he wrote to Senator Pittman, chairman of Senate sub-committee investigating the potash industry, alleging that the "English Borax Trust" had been responsible for driving him out of business. In 1934 he wrote to the Secretary of the Interior, repeating his complaints and stating that the "main object" of Pacific Coast Borax was "to get patent to sodium borate lands and to drive out all competition and hold a monopoly of the borax business." (R. 603). In 1938 his belief was revived by the reinstatement of the fraud order and other circumstances (R. 609-610) and he made plans to publish accounts of his difficulties (R. 610-611). He consulted an attorney, who advised him that so far as any damage sustained from the price-cutting of 1928 was concerned, his claim was outlawed (R. 614-615).

In 1939, he again wrote to the Secretary of the Interior, referring to the "formidable monopoly" of the defendants (R. 619) and on November 22, 1939 wrote to the Department of Justice, stating that the defendants constituted the "British Borax Trust" and "practically" controlled the price of potash and borax in America (R. 399); that they had conducted a price war in 1928 which the witness was convinced was "aimed purposely to destroy" the plaintiff, and that the plaintiff's attorneys felt that it "had a case against the Trust for violating the Sherman Anti-trust Laws" (R. 400). In 1940 Burnham pointed out that "for some time I have talked about the British-owned potash and borax interests getting most of the potash and borax deposits in this country and driving out American competition." (R. 655). Yet despite all of these accusations the plaintiff never instituted legal action to recover for its alleged injuries, because what money it had "was sent to us by our stockholders for other purposes" (R. 661).

Summarizing the evidence, it appears that whether the defendants herein attempted to fraudulently conceal from plaintiff its cause of action or not, there can be no doubt that the plaintiff discovered it many years before it filed its complaint, if indeed it was ever deceived. Plaintiff and its president, Burnham, repeatedly told the stockholders that it was the victim of a conspiracy in violation of the antitrust laws; sponsored articles which were to tell the public that; communicated with members of Congress to that effect, wrote the Secretary of the Interior, and complained to the Antitrust Division of the Department of Justice. It cannot now be heard to say that it was fraudulently deceived into believing that it had no cause of action, when for twenty years it pressed its case upon every conceivable opportunity.

In the light of all these facts, there can be no doubt that the plaintiff, throughout the period from 1929 on, not only had reason to believe, but did believe, that it had a cause of action against the defendants. Its attorneys so believed and so advised it. The District Court found quite correctly that Burnham's statements that he had no knowledge or cause for belief, even if admissible, could not conceivably permit of an interpretation contrary to the accumulated mass of written and sworn statements over the period in question. As the Court said, "no mere lip service to the contrary can rise to the dignity of creating a factual conflict" (R. 803). The Court was therefore correct in finding that the plaintiff knew or had cause to believe, for many years prior to 1944, that it had a cause of action against the defendants for damage to its business resulting from violations of the antitrust laws of the United States. It necessarily followed that suit on the cause of action was barred by the statute of limitations and that judgment was correctly entered for the defendants.

There can be no question that, on the evidence presented below, a verdict for the plaintiff, on the question of fact which was made the subject of the special trial, would not have been warranted, and if such a verdict had been rendered, the defendant would have been entitled to a new trial. The District

Court was therefore correct in directing a verdict for the defendants on this issue, under the long-established rule of the Federal courts.

Brady v. The Southern Railway Company, 320 U. S. 476 (1943);
Farr Company v. Union Pacific Railroad, 106 F. (2d) 437 (C. C. A. 10, 1939);
National Mutual Casualty Company v. Eisenhower, 116 F. (2d) 891 (C. C. A. 10, 1940);
Mutual Benefit Life Insurance Company v. Snyder, 109 F. (2d) 469 (C. C. A. 6, 1940);
Oklahoma Natural Gas Company v. McKee, 121 F. (2d) 583 (C. C. A. 10, 1941);
Barrett v. Virginian Ry. Co., 250 U. S. 473, 476 (1919).

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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No. 11,766
United States
Circuit Court of Appeals
For the Ninth Circuit

BURNHAM CHEMICAL COMPANY, a corporation,
Appellant,

vs.

BORAX CONSOLIDATED, LTD., a corporation,
PACIFIC COAST BORAX COMPANY, a corporation,
UNITED STATES BORAX COMPANY, a corporation, and
AMERICAN POTASH & CHEMICAL CORPORATION, a corporation,
Appellees.

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Brief for Appellees Borax Consolidated, Ltd., Pacific Coast Borax Company, and United States Borax Company.

STATEMENT OF THE CASE

The case is governed by the decision of this Court in *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F.2d 742, cer. den. 299 U.S. 613.

A. Nature of the Case.

1. THE ACTION.

This is an action at law¹ filed July 6, 1945. It was instituted

1. Not a suit in equity, as appellant asserts. See discussion at pages 50-54 *infra*.

under the antitrust laws (Title 15 U.S.C., Sec. 15; *Clayton Act*, Sec. 4) for the recovery of treble damages.

2. THE PARTIES.

The plaintiff² is a corporation organized in 1921 in the hope of producing borax from the brines of Searles Lake in San Bernardino County, California, on certain government leases, by solar evaporation. The defendants fall in two groups. One (hereafter referred to as PCB) consists of Borax Consolidated, Ltd. and its subsidiaries, Pacific Coast Borax Company and United States Borax Company, and is engaged in mining borate ores in Kern County, California, and making borax from the ore. The other is American Potash & Chemical Corporation (hereafter referred to as AP&CC), which is engaged in producing borax from the brines of Searles Lake.

3. DATE OF ACCRUAL OF THE CAUSES OF ACTION, AND DISMISSAL BECAUSE OF STATUTE OF LIMITATIONS.

Judgment was entered in favor of defendants on the ground that the action was barred by the statute of limitations.³

Plaintiff's alleged cause of action accrued partly in 1925 and partly in 1928 and in no part later than January 1929, or 16 years before the action was filed.

The plaintiff's alleged damage was suffered:

1. In 1924 and 1925, when defendants allegedly conspired to have the Post Office Department issue a "fraud order", preventing the plaintiff from using the mails (Compl. para. 73;

2. The appellant was plaintiff below and the appellees defendants. For convenience the parties will be referred to as plaintiff and defendants.

3. The court remarked:

"The plea of the statute of limitations is not a technical one. No court can disregard it because of a personal desire that someone may ultimately obtain recompense for an injury alleged to have been suffered. The statute of limitations plea is as much a component part of the scheme of administration of justice as is the theory that a just claim should be given consideration by a court. There are many reasons why claims must be timely presented." (R. 805)

R. 43-45). The fraud order was issued in June 1925, and its alleged effect was to compel plaintiff to abandon the production and sale of packaged borax in competition with defendants' products (R. 44).

2. In 1928, when defendants allegedly reduced the price of borax below plaintiff's costs of production, in conspiracy, as a result of which plaintiff was driven out of business entirely (Compl. paras. 73, 76; R. 44, 45, 47). It is alleged that, pursuant to conspiracy and in order to eliminate the plaintiff as a competitor, defendants reduced the price of borax by a number of price cuts, the first of which occurred in June 1928 and the rest of which occurred "by the end of 1928" (R. 45),

"with the result that plaintiff was losing a large amount of money due to said continued reduction in price of said borax, *and was therefore obliged to shut down and close its plant in January 1929.*" (R. 45)

In paragraph 76 of the complaint it is alleged (R. 47):

"That, as aforesaid, the said plant and business of plaintiff was shut down and closed on or about January 1929 for the reasons herein stated."

Thereafter the plaintiff was never in business. The damage for which it prayed (para. 81, R. 53) was the exact amount allegedly invested in developing its Searles Lake plant which ceased to operate in January 1929 (para. 73, R. 45).

No overt acts of defendants causing damage to the plaintiff are alleged to have occurred after 1929. This fact was conceded in the court below:

"The Court: * * * What overt act of the defendants in connection with the matters that are alleged, before you come to the Little Placer claim, what act of the defendants occurred that resulted in damage occurring after 1929 aside from this Little Placer claim?

"Mr. Carr: Nothing. We do not allege anything." (R. 242)

With respect to the Little Placer, a parcel of land in Kern County, the plaintiff did not claim that it sustained any damages for which defendants could be liable. The allegations about the Little Placer (Compl. paras. 77-79, R. 48-52) were inserted on the theory that in a suit for treble damages the running of the statute of limitations with respect to damage incurred may be tolled by a later "overt act" in a "continuing conspiracy" although the continuance of the "conspiracy" has no relation to the plaintiff and that "overt act" causes no actionable damage to it. This is succinctly revealed in the following colloquy:

"The Court: Is it your contention, Mr. Carr, that plaintiff was put out of business in 1929 as a result of an unlawful conspiracy and that the statute does not run as long as the conspiracy continues to be in effect?

"Mr. Carr: No, I do not go that far. My idea would be that it would run from the last overt act.

"The Court: What do you allege in the complaint to be the last overt act?

"Mr. Carr: The Little Placer Claim * * * *We could not prove any damages from it*, but we make a live issue of that thing in the complaint * * *." (R. 234, 235)

The matter of the Little Placer is further discussed at pages 61-65 below.

4. CONTENTIONS MADE BY PLAINTIFF BELOW TO ESCAPE STATUTE OF LIMITATIONS.

In the court below plaintiff sought to escape the statute of limitations on either of two theories: (1) that of "continuing conspiracy", just referred to, and (2) the claim that the statute had been tolled by "fraudulent concealment" committed by defendants. This last claim was based on the assertion that on May 17, 1929 plaintiff's president, George Burnham, accosted Mr. Zabriskie, general manager of PCB, and accused defendants of having conspired to cut the price of borax to drive plaintiff out of business, and that Zabriskie denied the accusation.

B. The Proceedings Below.

The defendants moved to dismiss the action on the grounds that the action was barred by the statute of limitations and that no claim for relief was stated (R. 55, 56, R. 72, R. 89, 90).⁴ We contended that the action was barred on the face of the complaint alone, but we also filed in support of the motion certain documentary material (R. 77-85), on the view that a "speaking motion" to dismiss is permissible under the Rules of Civil Procedure.⁵ After argument, the parties stipulated in writing that the motions should be deemed to be not only motions to dismiss but also motions for summary judgment under *R.C.P.* Rule 56 (R. 105, 107). Further affidavits and documents were then filed for and against the motions (R. 108-182).⁶

In the course of the argument the plaintiff suggested to the court (Dec. 5, 1945, R. 226, 254-257) that the issue of the statute of limitations should be tried first and apart from the merits of the case, under the example of *Momand v. Paramount*

4. The contention that no claim for relief was stated is, in our opinion, well taken, but will not be discussed since the court below placed its judgment on the statute of limitations.

5. Cf. cases such as *Central Mexico Light & Power Co. v. Munch* (2 Cir.), 116 F. 2d 85; *Boro Hall Corp. v. General Motors Corp.*, 124 F. 2d 822, 823 (2 Cir.); *Gallup v. Caldwell*, 120 F. 2d 90, 92 (3 Cir.); *Weeks v. Bareco Oil Co.*, 125 F. 2d 84, 93 (7 Cir.); *Cohen v. American Window Glass Co.*, 126 F. 2d 111, 114 (2 Cir.); *Lucking v. Delano*, 129 F. 2d 283, 285 (6 Cir.); and cf. *R.C.P. Rule* 12(b), as recently amended.

6. When the case was later tried, most of the documents theretofore filed in support of the motions were placed in evidence by us. To avoid requiring the same documents to be reproduced in the transcript on appeal twice, in our counter-designation of the record on appeal we stated that the documents might be omitted from the affidavits with a statement that they were duplicates of trial exhibits (R. 207-212). Later, appellant had the original trial exhibits sent to this Court instead of reproducing them in the record and obtained from this Court an order that they need not be printed in the transcript (R. 824). Consequently, the documents, which constitute a major part of the evidence, are not reproduced in full in the printed transcript. However, they were read into the record in whole or in part during the trial and thus all parts which we deem material do appear in the printed record.

Pictures Distributing Company, 36 F. Supp. 568, an antitrust case.⁷

In September 1946 the court, in a Memorandum Opinion (R. 184), denied the motion for summary judgment. At a later date, during the pre-trial conference, it said:

"I denied the motion for summary judgment because it seemed as if there might be lurking in the case some matter of weight of evidence, and in view of some of the decisions of our circuit court I felt it would be better to deny the motion and to have those matters determined preliminarily, that is, the matters that have to do with the statute of limitations." (R. 264) (And see R. 295).

While denying the motion for summary judgment, the court did not deny the motion to dismiss but, acting under *R.C.P.* Rule 12(d), reserved decision thereon until after the issue of the statute of limitations was tried. It followed plaintiff's earlier suggestion and ordered that issue to be tried first as permitted by *R.C.P.* Rule 42(b) (R. 185), and it gave defendants permission to file special answers setting up the defense of the statute of limitations without the necessity of answering the complaint generally.

The defendants filed such special answers (R. 190-193), and thereupon plaintiff moved to set the issue for trial *and demanded a jury* (R. 194). A pre-trial conference was then held to consider what issues should be presented to the jury. The court said that it was "impressed with the necessity of submitting some specific inquiry or inquiries to the jury so that we don't convert this trial of a special issue into a trial of the case", and plaintiff's counsel expressed full agreement (R. 300).

7. The stipulation that the motions should be treated as including motions for summary judgment also provided that in the event the motions were denied the plaintiff might request a special trial of the issue of the statute of limitations (R. 106, 107).

After thorough argument and careful consideration (cf. R. 287-320; R. 262-286),⁸ the court entered a pre-trial order (R. 195) that the jury should be asked to return a special verdict, as permitted by *R.C.P.* Rule 49(a), to a particular question:

"At any time from May 17, 1929 to October 10, 1939, did plaintiff know or have good cause to believe that its business had been theretofore damaged by acts of the defendants in violation of the Anti-Trust laws of the United States?" (R. 195)

The case was then tried before a jury on the special issue (March 26 to April 3, 1947). Appellant strangely asserts (Brief, pp. 2, 23, 36) that defendants offered no evidence. In fact, *the great bulk of the evidence was the defendants'*. Defendants cross-examined George Burnham (plaintiff's president, principal stockholder and chief executive since 1922 (R. 396, 397)) over 164 pages of the record and offered 29 of the 31 exhibits received in evidence.

At the close of the trial, after a full opportunity had thus been given to the plaintiff to present its evidence, the court concluded that the disputed fact that might possibly be "lurking in the case" (see p. 6, *supra*) simply did not exist, and it directed a verdict for the defendants, i.e., directed that the answer to the question should be in the affirmative (R. 198; see opinion from the Bench, R. 800-806).

The court said (R. 781, 782):

"We have had one witness who has testified in this case. What factual controversy is there for the jury to resolve? Nobody has disputed the questions of any conversation, the execution or sending of any document * * *

* * * * *

8. The pages of the printed transcript from 262-286 are designated as the transcript of proceedings of January 16, 1946. This is a stenographic error; they were the proceedings of January 16, 1947 and should follow, not precede, pages 287-320, which are the transcript of proceedings of December 2, 1946.

"* * * The witness Burnham has testified to certain facts. He has testified to conversations he had with people. He has testified to letters that he wrote. He has testified to letters that he received, documents that were executed by him or received by him have been put in evidence. Now, none of those things that he has testified of a factual nature have been disputed by anyone."

And again it said (R. 803, 804):

"* * * the evidence upon the issue now before the jury is undisputed. All of the evidence shows both knowledge and good cause to believe on the part of the plaintiff during the period specified in the special inquiry, that its business had been damaged by acts of the defendants in violation of the Anti-trust Laws. * * * However, even if the statements of the president of the corporation, who was the only witness, that he had no knowledge or cause for belief be considered as evidence, * * * the evidence is so conclusive in favor of an affirmative answer upon the special issue that the court would set aside a negative reply by the jury to the special issue. Statements in writing and under oath by the witness Burnham, who was the managing president of the plaintiff, commencing in 1925 and continuing throughout the years to 1940, show without dispute a continued awareness and knowledge of the plaintiff's cause of action set out in the complaint. Not only that, but these writings make continuous claim as to the responsibility of the defendants for the loss and damage caused to the plaintiff's business. Consequently, no mere lip service to the contrary can rise to the dignity of creating a factual conflict for resolution by the trier of the fact. There has been no evidence in the opinion of the court of any fraudulent representation or concealment by the defendants of the plaintiff's cause of action which deterred the plaintiff from timely presentation of its claim in this court. The so-called Zabriskie and Emlaw conversations do not

by any stretch of the imagination go beyond denials of the plaintiff's claim. In no sense do they reach the stature of fraudulent representations or concealment of such an affirmative nature as to in law be misleading to the plaintiff. Moreover, the evidence without dispute shows the plaintiff did not rely upon the statements made by these two men and hence there is no proof of any misleading character to be attributed to them."

The special issue having thus been disposed of, defendants' motions to dismiss came up for disposition (R. 806), were further argued and briefed, and some weeks thereafter, on May 5, 1947, were granted upon the statute of limitations (R. 199), and judgment was entered May 9, 1947 dismissing the action (R. 199).

C. The Facts Established at the Trial.

In June 1928 the plaintiff first opened its borax plant for production. That very month, the very month it started production, its two competitors, the PCB group and AP&CC, simultaneously cut the price of borax drastically to a point below plaintiff's cost of production (R. 505, 506). As a result plaintiff was driven out of business by January 1929.

1. THE "THURMAN ARNOLD LETTER," SHOWING PLAINTIFF'S CONVICTION EVER SINCE 1928.

Plaintiff's state of mind continuously throughout the years following the price cuts of 1928 is fully revealed by a letter which it wrote on November 22, 1939 to Mr. Thurman Arnold, then Chief of the Antitrust Division of the Department of Justice (Def. Ex. A, R. 397). The letter reads in part as follows (R. 398-401):

"Referring to a conversation which I had with Mr. Berge the other day, I understand that the Anti-Trust Division of the Department of Justice is investigating the alleged

violation of the Sherman Anti-Trust Laws by the Fertilizer Industries * * * The American Potash & Chemical Corporation and the Pacific Coast Borax Co. are both English-owned companies, and the two together constitute the *British Borax Trust*. Hence, the price of potash in America is practically under the control of the British Borax Trust.

"The Burnham Chemical at one time had a Government lease at Searles Lake, and was planning to make potash, borax and other chemicals from that deposit. We completed a plant in 1928 for the production of borax, and we expected, through the profits we made in borax, to add a potash plant and also make other chemicals and gradually grow to become a large producer. * * *

"However, the very month the Burnham Chemical Co. started production of borax, in June, 1928, a drastic cut in the price occurred, with the result that, in a few months, we were forced out of business. From outward appearances, it appeared that the price war on borax was between the two big English producers—namely, the American Potash & Chemical Corporation and the Pacific Coast Borax Co. The fact that the main price cutting in the price war started the month we began production convinces us that it was aimed purposely to destroy us. At least that was the resulting effect of the price war.

"We took the matter up with our attorneys, Francis J. Heney and B. D. Townsend, to see if we did not have a case against the Trust for violating the Sherman Anti-Trust Laws. These attorneys, who are now both deceased, felt that we had a case, but we were so completely ruined as a result of the price war, and also in debt, that we were financially unable to employ the attorneys to go ahead with the matter.

* * * * *

"Enclosed you will find a copy of a letter written by Mr. B. D. Townsend to H. S. Hinrichs, dated July 26, 1928, in which Mr. Townsend points out certain features of the unfair methods of competition being used by the British Borax Trust.

"There is also enclosed the preliminary draft of an article entitled 'Foreign-Owned Monopoly vs. the People of the United States.' It is really a history of the Burnham Chemical Co."

We shall refer to each enclosure later (see pages 22-23, 37-43, *infra*).

Thus ever since 1928 the plaintiff was convinced that it had been driven out of business by acts of the defendants in violation of the antitrust laws.

2. PLAINTIFF'S CONVICTION CONCERNING DEFENDANTS' VIOLATION OF THE ANTITRUST LAWS AND ITS DISTRUST OF DEFENDANTS PRIOR TO MAY 17, 1929.

(a) Plaintiff's Accusations Against Defendants in 1923.

Continuously for years before 1928 the plaintiff had thoroughly distrusted its competitors, AP&CC and PCB, and believed that they were resorting and would continue to resort to every means to drive it out of business, and that their word could not be trusted. For example, in a letter written on October 19, 1923 to Post Office Inspector McKean (Def. Ex. D, R. 452), who was investigating plaintiff, the plaintiff charged (R. 453):

"However, the success of our enterprise is not looked upon with favor by our potash and borax competitors. Our chief competitor who is said to be controlled by the Borax Consolidated of London, England, would be seriously affected * * *. They have therefore taken steps to hinder our development * * *.

"We have reason to believe that there are unseen forces at work tending to hinder the financing of our enterprise * * *"

and by "competitors" and "unseen forces" plaintiff here meant AP&CC and PCB (R. 454, 456).

In another letter written in October 1923 to Mr. McKean (Def. Ex. E, R. 457), plaintiff expressed hesitation "to furnish

anyone other than the Department of the Interior with a list of our stockholders," "owing * * * to the present active opposition of parties interested in preventing us from succeeding with our enterprise" (R. 458). Plaintiff here referred to AP&CC, PCB (R. 458), and to "all" whom it has "sued as defendants in the present action" (R. 464). Its "belief and suspicion" "that its competitors were trying to injure" it "was of long standing," "went back to these dates in 1923" and "was strong enough to prevent us from giving our stockholders' lists to anybody." (R. 464, 465)

In October 1923 plaintiff also wrote a letter (Def. Ex. F, R. 465) to Mr. Varley of the United States Bureau of Mines, who also was investigating plaintiff (R. 466). The plaintiff charged:

"Our potash and borax competitors do not look with favor upon the position of our making potash and borax at such a low figure. In fact, we have reason to believe that there are influences apparently at work against the development of these Government borax and potash deposits at Searles Lake, which make it exceedingly difficult to finance our enterprise" (R. 466)

and by this plaintiff referred to AP&CC and PCB (R. 470).

(b) Plaintiff's Accusations Against Defendants Upon Issuance of Fraud Order, and in the Carson City Suit—1925, 1926.

No sooner was the Post Office fraud order issued against plaintiff in June 1925 than it immediately suspected that the present defendants were responsible, but George Burnham noted in his diary a resolution to make no accusations until he had more than surmise (R. 427, 428). But his hesitation soon vanished as his belief became conviction.

In September 1925 the plaintiff filed a suit in the United States District Court for the District of Nevada against the Postmaster to enjoin and set aside the Post Office fraud order (R. 643), entitled "*Burnham Chemical Company, George B.*

Burnham and V. E. Scott, plaintiffs, v. George F. Smith, Postmaster of the United States in Charge of the Post Office at Reno, Nevada, defendant," Equity No. 75. For convenience we shall refer to this as the *Carson City suit*. On November 6, 1925, Burnham sent a circular letter to his stockholders (Def. Ex. Q, R. 572) in which he said:

"The company is ably * * * managed, aggressively going forward on the highroad to production of borax on a huge scale, *and that is the very reason our competitors [i.e., AP&CC and PCB] apparently instigated an unjust Post Office action against us—apparently they see the handwriting on the wall—they fear that the new Burnham plant is going to lead the world in borax production!*" (R. 572)

In December 1925 Burnham wrote another circular letter to his stockholders (Def. Ex. AA, R. 643), referring to the

"unwarranted action by the Post Office *which we contend was inspired by large competitors who are naturally alarmed that the new Burnham plant will become a formidable factor in the borax field.*

"* * * they have good and sufficient reasons for regarding us as competition to be reckoned with. * * * we propose to give our competitors a fair fight for supremacy in the field. But our fight will be in the open and only by the fair methods known to reputable American institutions." (R. 643, 644)

In February 1926 Burnham again wrote his stockholders (Def. Ex. AB, R. 645), describing the action of the Post Office as being "apparently at the instigation of certain foreign-controlled competitive chemical interests evidently seeking to be the only ones to recover these great rich deposits of borax and other minerals and who apparently had long been working in the dark to accomplish their ends," the "foreign controlled competitive interests" here referred to being AP&CC and PCB (R. 645).

By April 1926, plaintiff was thoroughly convinced that the defendants had conspired in violation of the antitrust laws to drive it out of business and to obtain the fraud order as a means thereto, and on April 14, 1926 it filed in the Carson City suit against the Postmaster a *printed* Amended Complaint. George Burnham verified and swore to this under oath.

This Amended Complaint (Def. Ex. C, R. 407), with much embellishment,

1. Charged that the present defendants, i.e., AP&CC and PCB, had conspired to obtain the issuance of the fraud order in order to drive the plaintiff out of business.

2. Accused these defendants of constituting a monopoly, a borax trust and a conspiracy in restraint of trade, all in violation of the antitrust laws of the United States.

3. Called on the United States Government to prosecute these defendants under the antitrust laws.

This document is 77 pages of fine print, on legal size paper (not counting exhibits), and pertinent passages were read into the record at pages 409 to 423. We summarize and quote portions below:—

One Dr. Stewart, an official in the Bureau of Mines, was appointed by the Secretary of the Interior at the Postmaster General's request to investigate the plaintiff (R. 410, 411). In February 1925, Dr. Stewart submitted to the Post Office Department a report. Plaintiff alleged that "The contents of said so-called 'report' and the official opinions and actions of Dr. Stewart in the premises, were influenced by certain false and defamatory propaganda and other acts on the part of the competitors of the Burnham Chemical Company" (p. 6; R. 409, 410). The pleading then proceeded to describe (Para. IX, p. 18, R. 411) the "Defamatory Propaganda by Borax Trust [i.e., AP&CC and PCB (R. 411)] against Burnham Chemical Company and Burnham Solar Process" and alleged:

"Thus, not only will both of said companies be affected as competitors by the developments and operations of the Burnham Chemical Company, but both of them are interested in preventing the Burnham Chemical Company * * * from developing or operating any plant or process for the recovery of any of the salts contained in the brine of Searles Lake.

"(b) By reason of the premises, *for more than six years last past, said competitors [i.e., AP&CC and PCB (R. 413)] have engaged in efforts (most of them in secret) to injure and discredit, and prevent the success of, the 'processes, plans and developments' of the Burnham Chemical Company.*"

* * * * *

"(c) * * * the aforesaid competitors of the Burnham Chemical Company well knew of said assignment of Dr. Stewart and the antecedent facts in the premises hereinbefore stated; and further knew that the Burnham Chemical Company was then about to commence the production of borax. Thereupon, the aforesaid competitors resumed and increased their aforesaid efforts to injure and discredit, and prevent the success of, the 'processes, plans and developments' of the Burnham Chemical Company. Their ultimate objects in the premises were, first to prejudice the general public against the Burnham Chemical Company, so as to defeat the efforts of the company to finance its enterprise through the sale of its capital stock to the public; second, to discourage dealers in borax from dealing with the Burnham Chemical Company, by convincing them that the Burnham Chemical Company would not be able to develop and maintain a dependable production, because of its financial weakness and because of a doubt (falsely induced by said competitors) concerning the practicability of its process. *Their immediate object was to prejudice and deceive the Postmaster General and the officers and agents of the Post Office Department engaged in conducting said investigation, and particularly Dr. Stewart and the other officers and agents of the U. S. Bureau of Mines*

engaged therein as aforesaid, *and thereby procure and induce the issuance of a fraud order against the Burnham Chemical Company and Mr. Burnham individually.* To that end, among other things, the aforesaid competitors of the Burnham Chemical Company, through their officers and agents, influenced, procured and induced the false and defamatory propaganda concerning, and attacks upon, the Burnham Chemical Company and Mr. Burnham individually, hereinafter set forth." (R. 413-415)

The pleading then alleged numerous acts of defendants in 1924 and 1925 to spread defamatory propaganda against plaintiff in the form of editorials in trade and scientific journals, including expulsion of Burnham from the American Chemical Society. It alleged that "by means of said false and defamatory editorials and otherwise," "said competitors of the Burnham Chemical Company discouraged dealers in borax from purchasing any of the small quantity of borax which the Burnham Chemical Company then had on hand," that "said competitors * * * caused said defamatory editorials to be brought to the attention and knowledge of Dr. Stewart, within a few days after they were published, respectively, and conveyed to Dr. Stewart divers other false and defamatory statements in the premises," that they did all these things

"for the immediate purpose (among others as hereinbefore stated) of influencing the official opinion and action of Dr. Stewart in the premises, and (through Dr. Stewart) the official opinion and action of the officers and agents of the Post Office Department, and particularly the Solicitor for the Post Office Department and the Postmaster General, in the investigation, consideration and disposition of the aforesaid charges against the Burnham Chemical Company and Mr. Burnham individually. * * *

"(k) Plaintiffs are informed and believe, and therefore allege, that the aforesaid false and defamatory propaganda and attacks did influence the official opinion and action of Dr. Stewart in the premises; and thereby, and otherwise, did influence and induce the subsequent official opin-

ion and action of the Solicitor for the Post Office Department and the Postmaster General, respectively, as hereinafter set forth." (R. 412-418)

The pleading further alleged (para. X, p. 21; R. 419), under the caption "False and Misleading 'Report' by Dr. Andrew Stewart Concerning Investigation by U. S. Bureau of Mines" that Dr. Stewart's report to the Postmaster General

"concealed and misrepresented the true facts in the premises, and consisted mainly of a repetition of the false and defamatory propaganda disseminated by the competitors of the Burnham Chemical Company as aforesaid, disguised in new verbiage, and presented to the Postmaster General and the Post Office Department, ostensibly as the impartial views of the U. S. Bureau of Mines." (R. 419)

The pleading then charged, and we call particular attention to this:

"that the difficulties encountered by Mr. Burnham in marketing said small amount of borax then on hand were created by the aforesaid competitors of the Burnham Chemical Company for the express purpose, among other things, of discrediting the Burnham Chemical Company and furnishing some false and fictitious ground upon which a fraud order could be based; and that said monopolistic restraint of the commerce in borax was and is a flagrant violation of the laws of the United States, and could and should be prohibited by criminal and civil proceedings instituted by the United States; and Dr. Stewart further knew that said circumstances demanded the prosecution of the Borax Trust under the Anti-Trust Laws of the United States, but did not warrant or justify the prosecution of the Burnham Chemical Company or Mr. Burnham under the Postal Laws of the United States." (p. 24; R. 419, 420)

By "Borax Trust" plaintiff here again meant AP&CC and PCB (R. 420).

With great prolixity the pleading then charged that

"Dr. Stewart's so-called 'report' was in effect a complaint or petition on the part of the competitors of the Burnham Chemical Company, with the true authorship of said document concealed, to procure and induce the issuance of a fraud order in the premises, for the purpose of destroying the Burnham Chemical Company, and thereby averting competition (otherwise inevitable) in the production of borax, potash and other salts from the brine of Searles Lake; and for the further purpose of enabling the Borax Trust to maintain its monopoly of the commerce in borax, in violation of the laws of the United States."
(p. 25; R. 420, 421)

The pleading also alleged (para. XXIX, p. 73, R. 421, 422) that the

"effect of the fraud order was to taint the reputation of the company and its officers with suspicions of fraud and dishonesty, and greatly impair their commercial credit.
* * * *In the meantime, the company must enter into competition with a strongly entrenched foreign-owned trust, which controls nearly 90 per cent of the borax trade of the world, and which is keen to take advantage of every weakness of its competitors.* Already, the fact of the issuance of the fraud order and the effects of it have been extensively published and advertised with every possible derogatory and damnifying insinuation and innuendo."

And in paragraph XXX, p. 75 (R. 422, 423), under the caption "Additional Facts Concerning Efforts of Borax Trust to Preclude Development of Burnham Solar Process; Concealment Thereof from Solicitor and Postmaster-General," the pleading alleged "that by their unlawful violation of their contractual obligations, and their subsequent unlawful assertion of rights adverse to Mr. Burnham as hereinbefore stated, the Pacific Coast Borax Company * * * intended, and attempted, to render Mr. Burnham financially helpless and permanently preclude the development of the Burnham Solar Process, for the

reason that it would virtually destroy the value of their existing plants, constructed and installed to operate under more expensive processes, with an investment exceeding \$30,000,000." (R. 422).

Allegations were made of efforts of PCB to obtain a lease at Searles Lake in order to exhaust

"the entire chemical deposit of Searles Lake, and to have transferred it to the ponds of the Pacific Coast Borax Company; and thereby the Pacific Coast Borax Company would have secured virtually a permanent monopoly of the production of potash and borax in the United States, so far as concerns the present known deposits thereof,"

And it was alleged that Burnham foiled this scheme (R. 423).

When Burnham verified this pleading in 1926 he believed what it said and he believed that his attorney, Townsend, "had good grounds" to put the allegations into the document (R. 433). Plaintiff caused it to be printed and distributed over 7000 copies (R. 432).

(c) The Mather Letter.

The complaint in the present case charges that defendants caused the fraud order to be issued through a "highly placed federal government representative who formerly had been * * * Chicago manager and representative of defendant Pacific Coast Borax Company." (R. 43). The man referred to was Stephen Mather, father of the National Park Service (R. 483, 484).

Subsequent to the filing of the Amended Complaint in the Carson City suit, C. W. Whitney, a director of plaintiff, received from Stephen Mather a letter dated October 8, 1926, in response to an inquiry, in which Mather claimed responsibility for the issuance of the fraud order (Def. Ex. G, R. 481). Burnham saw this letter shortly after Whitney received it (R. 482, 489). It inflamed and confirmed his previous beliefs. He attached the greatest significance to it, had it photostated, and preserved it in a safe-deposit box until the present time (R. 483).

For example, thirteen years later, on November 18, 1939, six years before the present suit was brought, plaintiff wrote a letter to the Secretary of the Interior of the United States (Def. Ex. H, R. 484, 485), enclosed a copy of the Mather letter, and charged:

"We believe that it was the influence of foreign-owned interests in the halls of government which was behind all of the difficulties of the Burnham Chemical Co. * * * The reasons we are led to believe this are as follows: Stephen T. Mather was the one-time Chicago manager of the Pacific Coast Borax Company and was assistant to the Secretary of the Interior from 1915 to 1917 and was a Director of the National Park Service of the Department of the Interior from May 16, 1917, up until the time of his death about 1930 (See Who's Who in America, 1926). While he held this high government position he was also Vice-President of the Stirling Borax Company which is a subsidiary of Pacific Coast Borax Company, a foreign-owned enterprise. Stephen T. Mather admits that he was in a measure responsible for the Post Office fraud order being issued against the Burnham Chemical Company in a letter dated October 8, 1926, written to Clarence Whitney, one of the directors of the Burnham Chemical Company. * * *

* * * * * *

"Mr. Mather himself admits the process may be all right and the foreign-owned *Borax Trust* itself endorses the process. *And so they were afraid we would be a formidable competitor and Mr. Mather informed the Post Office to issue a fraud order so we could not raise funds.* Mr. Mather was a high Government official and also an officer and stockholder in the British-owned Borax Trust." (R. 486, 487)

In March 1927 Whitney called on Mather to see whether, in having the fraud order issued, Mather had acted for Burnham's competitors or for the public interest. Whitney "was not satisfied" with Mather's explanation, nor was Burnham (R. 491).

The Mather letted loomed so large in plaintiff's mind that in January 1929 it asked its attorney Townsend to call on Mather

in Chicago (Def. Ex. I, R. 492, 493), and early in May 1929 Burnham made a diary reminder to check further Mather's connection with PCB (R. 494).

Then, a few days later, on May 17, 1929, Burnham called in New York on C. B. Zabriskie, then General Manager of PCB. When he walked into Zabriskie's office, he saw Mather's picture on the wall (R. 494), and the fact made a tremendous impression on him. (R. 496).

"Q. And you believed at the time you talked to Mr. Zabriskie that Mr. Mather's reason for getting that fraud order issued was to injure the Burnham Chemical Company, in order to benefit its competitors, Pacific Coast Borax Company, and American Potash & Chemical Corporation. * * * Was that what you believed at the time you talked to Zabriskie? I am trying to get your state of mind then. You said you were very much impressed by the fact that his picture was on the wall. Was that why you were much impressed by it? A. Yes.

"Q. Because at that time you had that belief in your mind? A. That is right." (R. 499, 500)

Though he was of this belief, he did not mention the matter to Zabriskie, Zabriskie said nothing to him about it, and later in May 1929 Burnham tried to call on Mather in Chicago "because of the price cut in borax" in 1928 as the result of which plaintiff was "forced out of the borax business", Burnham's "suspicions were aroused again", and he wanted to "see whether or not he [Mather] had some ulterior motive" (R. 498, 499).

The Mather letter arises repeatedly as an item of importance in plaintiff's mind. In July 1934 Burnham consulted plaintiff's attorney, Townsend, concerning the monopolistic drive of the PCB group and his suspicions concerning the defendants (R. 501), and Townsend told him to take important documents to Washington, specifically mentioning the Mather letter, "to help [his] cause along" as evidence of defendants' intent to injure plaintiff (R. 502). Both Townsend and he thought it might be evidence "to support the charge of conspiracy between the

Pacific Coast Borax Company and the American Potash & Chemical Company to injure [his] company", of being "responsible for the Post Office Fraud Order * * * and for other acts injuring the Burnham Chemical Company" (R. 502, 504). And in September 1939 plaintiff again went east and took the letter with him (R. 505).

(d) Plaintiff's Attorney Advises It in 1928 that Defendants Had Violated Anti-trust Laws to Its Damage and Warns Against Defendants' "Excuses and Explanations" of Price Cuts as "Cloaks and Disguises."

Plaintiff followed the price cuts of 1928 very closely (R. 507) and immediately consulted his attorneys Francis Heney and B. D. Townsend, to ascertain its rights against the present defendants. Townsend wrote a letter to a Washington attorney, Hinrichs, and gave a copy to plaintiff which it treasured ever since (R. 509). This letter (Def. Ex. J, R. 510), written July 26, 1928, contains these passages:

"A condition has arisen in the borax industry, concerning which I may be asked to render an opinion upon the following question:

"If two concerns already in control of the borax market, not only in the United States but in the whole world, engage in a price war, by selling at prices which preclude any profit, and the immediate effect of which will be to kill off the only potential competitors; is the transaction one which may properly be made the subject of action by the Federal Trade Commission, under the 'unfair competition' clause (Section 5) of the Federal Trade Commission Act?

"There are other features of the transaction which might strengthen the case. For example, I am inclined to think that the present competition, although very bitter in form, and apparently in earnest, is in fact designed by the controlling heads of these two concerns (and which are located in England) for the express purpose of killing off threatened competition, although their subordinates may not really know that to be the fact. * * *

"I had given some consideration to the terms of the Federal Trade Commission Act; and I have read the discussion of 'Price Cutting as a Form of Unfair Competition', in Henderson's book, 'The Federal Trade Commission,' written in 1924, including the four cases discussed at pages 246 to 261. * * * From my limited consideration of the question, I am inclined to the opinion that proof of a persistent maintenance of prices at such a low level as to preclude profit, for a period of approximately two years, with proof that the direct effect thereof is to crush attempted competition, would constitute 'unfair methods of competition in commerce,' within the meaning of the law. Stating it more precisely: I think that proof of those facts would constitute a prima facie case and would throw upon the parties employing those methods the burden of justifying them. * * * (R. 510-512)

* * * * *

"* * * If these two English concerns are engaged in actual competition, then the present price war is even more clearly a case of 'unfair methods of competition in commerce'; while, on the other hand, if they are not engaged in actual bona fide competition, then the present ostensible price war could have no other purpose than to prevent the establishment of any competitors in the business." (R. 513)

Plaintiff understood this letter to refer to PCB and AP&CC (R. 514).

In November 1928 Townsend gave Burnham an opinion letter (Def. Ex. K, R. 515), advising that "I am now convinced that proceedings before the Federal Trade Commission would result in substantial benefits to those interested in the subject" (R. 517). Attached to the letter was a memorandum entitled "Application of Federal Trade Commission Law to Borax Trade Conditions" (Def. Ex. L, R. 518), in which Townsend said:

"For about three years, and particularly during the past year, a persistent price-war has been waged in the Borax Trade, until the price has been reduced to a point below

actual cost of production, if all of the actual elements of production-cost are included in the computation, and the methods of computation are otherwise correct.

"This situation imperils the continued existence of competition in the Borax Trade, and will ultimately lead to the establishment of an absolute trust, if the causes of the situation are not terminated.

"Various excuses and explanations are offered by those responsible for this situation, but it is quite evident that these excuses and explanations are mere cloaks and disguises, and that an adequate investigation of the subject will develop proof that this situation is the natural and inevitable result, and therefore the very object and purpose, of trade practices which are in violation of the Federal Trade Commission Act, also the Federal Anti-Trust Laws.

"These unlawful practices may be concealed by clever theories and ingenious accounting devices, but when the true facts are disclosed, the very cleverness and ingenuity employed to cloak and disguise the true facts, will become added and persuasive proof of consciousness of an illegal purpose.

"If this matter is to be brought to the attention of the Federal Trade Commission, there should be little or no discussion of the facts or the methods by which they may be established, until they are presented to the Commission; otherwise there is danger, no matter how cautiously the subject is handled, that the party charged may learn the methods to be employed to expose the true facts, and may then defeat the most thorough and intelligent investigation by the Federal Trade Commission investigators.

"This caution is especially applicable to cases where the illegal practices have been cleverly concealed or disguised."
(R. 518, 519)

(e) Plaintiff's Advice to Its Stockholders in Early 1929 Concerning Price Cuts.

In January 1929 plaintiff sent a circular letter to its stockholders (Def. Ex. M, R. 521), which contained these passages:

"Some very important developments in the borax market have been taking place in recent months which have vital significance, *in spite of the fact that the apparent motives back of them are being carefully camouflaged.* For the past hundred years, in fact during its entire history, the price of borax has never been below \$75 per ton delivered. *It is rather a peculiar coincidence that last summer, just at the time we were getting ready to produce and put our product on the market, the price dropped to \$50 per ton delivered.*

* * * It means that we cannot make any profit on our borax. * * *

* * * * *

"It has been urged by some who are familiar with the situation that in selling borax at \$50 per ton our competitor is selling below actual cost of production, if correctly computed; *and that this remarkable cut in the price of borax is nothing but a price war to destroy competition, and particularly the competition of young competitors who are struggling to become established.* This matter has been under consideration for some time, and, for obvious reasons, the subject was kept confidential while it was under investigation. That is the reason why this price war has not been mentioned to you until the present time; and, for the same general reason, further discussion of it will not be indulged in at this time. * * *" (R. 521).

In March 1929 plaintiff sent another circular letter to its stockholders (Def. Ex. N, R. 523), in which it said:

"But just as we went into production came the slash in the price of borax. The price dropped to the lowest level in the history of borax production. A drop of more than 50 per cent in the price of borax at the plant. * * * We believe no one is really making a profit, * * * Your company, an infant in the industry, without definitely established markets, without surplus or reserve, was hit the hardest. * * *

* * * * *

"Let us take stock of our resources. What have we? On close checking we believe that we have quite a lot.

True enough, not much to put on the market for a quick sale, under the conditions, but a big thing if properly developed. * * * *What is wrong then? Nothing fundamentally, except that some sinister forces apparently are trying to rob us of what is rightfully ours. They know our weak point (lack of surplus and reserve) and they are trying to take advantage of it.*" (R. 523-525)

Plaintiff admitted that by "sinister forces" he meant PCB and AP&CC.

Immediately before calling on Zabriskie in May 1929 Burnham visited some of his eastern stockholders and told them "that the price cuts by the defendants had occurred simultaneously and in the very month [plaintiff] started production" and that he thought that "was a peculiar coincidence" (R. 543).

(f) Defiance of Plaintiff by, and Plaintiff's Disbelief in, AP&CC, and Its Distrust of PCB—December 1928 to May 1929.

On December 26, 1928, plaintiff called on Mr. Emlaw, president of AP&CC, and accused Emlaw and his company of infringing plaintiff's patents. Emlaw denied the accusation and was "angry and defiant", and Burnham did not believe the denial (R. 527). On leaving Emlaw, Burnham called the same day on Zabriskie, General Manager of PCB, and asked him to put up \$50,000 to finance plaintiff in a patent infringement suit against AP&CC (R. 528, 534). As an inducement to PCB to do this, Burnham told Zabriskie that "if the American Potash & Chemical Company were infringing our process, and we prevailed in a suit against them, then they would have to pay us royalties, and, of course, that would increase the price of borax". "would benefit the Pacific Coast Borax by raising the price" and "would be a legal way of protecting ourselves on the drastic cut in price" (R. 528, 529).

Burnham followed up with a letter to PCB on the subject on January 15, 1929 (Def. Ex. O, R. 530). The letter contains these passages:

"After a careful investigation and consideration of the matter, we became convinced that the American Potash & Chemical Corporation was, and for a long time had been, engaged in flagrant violations of our [borax] patent rights; whereupon we served upon them a formal notice of infringement on October 31, 1927.

"2. In the meantime, the American Potash & Chemical Corporation has engaged in a persistent and flagrant price war, as to borax, reducing the price to \$50 per ton or less, delivered anywhere in the United States. *We are reliably informed that the prices quoted by this company in the present month and for several months last past, are below its actual cost of producing borax, if such production cost be accurately and properly computed, and we are further reliably informed that the specific purpose of this price war is to destroy competition as to borax.*

"3. * * * *We are advised by our attorneys that, under these facts, the American Potash & Chemical Corporation is engaged in an 'unfair method of competition,' within the provisions of the Federal Trade Commission Act, and allied acts.*" (R. 530-532)

By "allied acts" plaintiff referred to the antitrust laws (R. 532). The letter concluded "that the very institution of a suit by us as above proposed will result in an immediate increase of the price of borax of not less than \$10 per ton, and this increase alone will much more than offset the cost to your company of such benefits of the above proposition." (R. 532)

After receipt of this letter and before May 1929, PCB refused to finance plaintiff's lawsuit. This refusal added to the plaintiff's conviction that PCB and AP&CC had conspired together to cut prices.

"Q. Then, when Mr. Zabriskie refused to advance the money to assist you in bringing a patent suit against the American Potash & Chemical Corporation so that you could get the price up, you attached significance to that, did you?

"A. Well, I felt very certain that the American Potash was infringing our patents and the very fact that Zabriskie,

who wouldn't cooperate in any way to help us, and incidentally help himself for supporting our infringement suit against the American Potash & Chemical Company, *the very fact that he wouldn't cooperate gave me added belief or suspicion that he was cooperating with the American Potash & Chemical Company and cooperating with them to cut the price in order to drive us out of business.*" (R. 534, 535)

At this time, too, litigation over mineral patents was pending between PCB and plaintiff and continued for several years (R. 553-554), and in it plaintiff was accusing PCB of dishonesty and fraud (Cf. R. 673).

3. ALLEGED CONVERSATIONS OF MAY 17, 1929.

Plaintiff claims that on May 17, 1929, Burnham again called on Zabriskie in New York. Since Zabriskie died in the early 1930's, and no one else is said to have been present, we know nothing of this visit except as Burnham tells it. Burnham *accused PCB of conspiring with AP&CC in the matter of the price cuts* in order to injure the plaintiff (R. 536), and Zabriskie denied the accusation. Burnham never thereafter saw him again (R. 536). Then Burnham immediately called on Emlaw, president of AP&CC, and despite the alleged denial by Zabriskie, *Burnham repeated the same accusation to Emlaw* (R. 536). He did not, however, repeat the accusation of patent infringement which he had made the previous December, although he still disbelieved Emlaw's denial (R. 539).⁹

9. "Q. When you called upon Mr. Zabriskie on the morning of May 17, 1929, you accused him, did you not, of conspiring with the American Potash & Chemical Corporation for the deliberate purpose of driving you out of business?

A. Yes. * * * I told Mr. Zabriskie, 'It looks to me like you fellows were cutting the price of borax purposely, deliberately, to drive the Burnham Chemical Company out of business.

Q. And you called his attention to the fact that the price cut had occurred the very month you started production? A. Yes.

Q. You talked to Zabriskie that morning, and then you went right over to see Mr. Emlaw that afternoon, only taking time for lunch did you not? A. Yes.

When denying plaintiff's accusation, Zabriskie mentioned the "large production, the over production and the cheaper source of borax in the Kramer District" (R. 546), and Emlaw said "that they had an immense production, and that their production had gone up by leaps and bounds" (R. 547), but neither Zabriskie nor Emlaw gave any actual production figures and both spoke in generalities only (R. 547). Moreover, what they said about increased production and cheaper costs was true, and Burnham already knew it as he had previously made an independent investigation, but he did not believe that these factors sufficed to explain the sudden nature of the price cuts and their timing (R. 547).

"Q. So when you went to see those gentlemen on May 17 you knew there was overproduction and a large amount overhanging the market, did you not?

"A. Yes, but I could not understand why there should be such a cut in the price of borax the very month we started production.

* * * * *

"Q. And the only thing they told you that morning that you did not already know was their denial that they had deliberately done this price cutting for the purpose of driving you out of business, isn't that true?

"A. Well, except for this: I could not understand why it should go so low, even though there was an over

Q. And when you called upon Mr. Emlaw in the afternoon you accused him of cutting prices in conspiracy with the Pacific Coast Borax for the purpose of injuring your company, did you not?

A. Yes. * * * and I told Mr. Emlaw about the same as I told Mr. Zabriskie, namely, 'It looks as though you had cut the price on borax for the deliberate purpose of driving us out of business.

Q. *You made that accusation as firmly as you could with politeness, did you not?* A. Yes, that is right.

Q. Did you tell Mr. Emlaw why it was that you believed he and Zabriskie's company were conspiring to drive you out of business?

* * * * *

A. Yes, substantially the same as I told Mr. Zabriskie.

Q. That is to say, it seemed very strange that the price was cut in half the very month your company started production? A. Yes.

Q. And that they knew you were starting production in that month?

A. Yes." (R. 544, 545)

supply. I could not understand why it should go down so low as \$13 a ton in bulk." (R. 548, 549)

As a matter of fact, the statements allegedly made by Zabriskie and Emlaw about increased production and lower costs of production were the very "excuses and explanations" that plaintiff's attorney Townsend had told him were mere "cloaks and disguises" the previous November (see p. 24, *supra*). Thus, Burnham admitted that he "understood that one of the excuses which Mr. Townsend referred to as being a mere cloak and disguise was the claim that the Kramer field was a cheaper source of supply for borax" and "that was also one of the statements made * * * by Mr. Zabriskie in May 1929 as an excuse or explanation for the price cut." He admitted that by "the various excuses and explanations" Townsend was referring "to the fact that there were improved processes for making borax * * *; also because the Kramer field was a cheaper source of borax supply * * * and also because there was an over-supply of borax on the market" (R. 552, 553).

After these alleged conversations with Zabriskie and Emlaw, Burnham told neither his stockholders nor his Board of Directors of them (R. 648).

4. CONTINUOUS REASSERTION BY PLAINTIFF AFTER MAY 1929 OF ACCUSATIONS AGAINST DEFENDANTS IDENTICAL WITH THOSE THERETOFORE MADE.

(a) Solemn Reassertion in Carson City Suit, January 1930.

In January 1930 a hearing was held in the Carson City action before Judge Norcross on the plaintiff's application for a temporary injunction against the Postmaster (R. 555), and plaintiff reiterated and embellished all the accusations which it had made against the present defendants before May 1929 (see pages 12-19, *supra*). On January 15, 1930, plaintiff filed an affidavit by George Burnham in support of its application (Def. Ex. P, R. 556). In this affidavit Burnham said that cer-

tain portions of the Amended Complaint in the cause were true of his own knowledge (cf. R. 557-560), and then added, to make sure that there would be no mistake about plaintiff's beliefs and convictions, its charges and accusations,

"At the commencement of this affidavit, affiant stated that certain portions of the amended complaint are true as affiant's personal knowledge. *To the end that there may be no misunderstanding: as to the matters in the amended complaint which are not within the personal knowledge of affiant, affiant is reliably informed that they are true, and verily believes them to be true.*" (R. 561)

Burnham believed then and subsequently that "I had good reason to believe that they [the accusations in plaintiff's pleading in the Carson City action] *were true*" (R. 565).

Moreover, the affidavit stated the facts as to the price cuts, "As our plant was completed, and our operations begun, the price of borax was still further reduced * * * and the Burnham Chemical Company could not make a profit * * *" (R. 565, 566). And it concluded:

"The immediate effect of this price war was to compel the Burnham Chemical Company to suspend operations at the end of the year 1928. *It appears quite certain that this price war was intended to be only temporary, to accomplish some object beneficial to the authors thereof, and that normal prices will ultimately be restored.*" (R. 567)

By this he referred to and meant the intentions of AP&CC and PCB (R. 570).

(b) Plaintiff Inflamed Again in 1934 and Consults Counsel.

In 1934 the plaintiff's beliefs concerning defendants' violation of the antitrust laws were again inflamed. There had been only three companies mining borate ore,—PCB, Western Borax Company, and Suckow Borax Company; by 1934 PCB had taken over Western and was about to acquire Suckow; Burnham knew the fact and was aroused (R. 576, 580), for the only

other source of borax was Searles Lake, and most of the production from it was in the hands of the defendant AP&CC (R. 576). "In other words, on July 30, 1934, I realized that the Pacific Coast Borax group were getting almost a complete monopoly of the Kramer borax district" (R. 574, 575).

Therefore, on July 30, 1934 plaintiff again consulted its attorney Townsend and Francis J. Heney, who had become Judge of the Superior Court in Los Angeles (R. 576, 577). Townsend told him that Mr. Neblett, a law partner of Senator McAdoo, had recently and publicly accused PCB of being an illegal monopoly in violation of the antitrust laws (R. 580, 581).

(c) Glavis Letter and Conversation, 1934.

On Townsend's advice Burnham then went to Washington and carried with him a letter of introduction from Judge Heney to Mr. Louis Glavis, head of the Bureau of Investigation of the Department of the Interior. This letter of introduction (Def. Ex. R, R. 584), dated August 23, 1934, said:

"Dear Louis:

This will introduce my friend and former client, George B. Burnham, who desires to talk with you about a matter which I think it is well worth you while to investigate, to-wit, *the matter of the Pacific Coast Borax Company having established, continued and maintained an evil and strangling monopoly in the borax business. It is a foreign-controlled corporation*, and borax has become a material of such general use in the United States that *a monopoly thereof is oppressive in many lines of business.*

* * * I think he is about as well posted as any man in the United States in regard to the borax business, and in relation to the question of the monopoly thereof by the Pacific Coast Borax Company." (R. 585, 586)

Burnham called on Glavis, taking with him the Mather letter (R. 587) and a copy of plaintiff's Amended Complaint in the Carson City action and of the affidavit filed therein in

January, 1930 (R. 597, 598). He told Glavis that "the American Potash & Chemical Company and the Pacific Coast Borax Company, had cut the price of borax in the month of June, 1928 in the very month that [his] company had started production" and that "after [plaintiff] had sold [its] borax toward the end of 1929, about November of 1929, these same companies then increased the price of borax by one-third" (R. 586).

In short, these circumstances still loomed in plaintiff's mind as proof that the price cuts were conspiratorial and designed for plaintiff's destruction. As Burnham testified, he "attached significance * * * to the fact that those price cuts occurred * * * at that time" (R. 599).

(d) Plaintiff's Letters to Secretary of Interior Ickes, 1934.

In September, 1934 plaintiff wrote a letter to Mr. Ickes, Secretary of the Interior (Def. Ex. U, R. 601) and said:

"In the summer of 1928 this company, after overcoming many difficulties, succeeded in completing its borax plant upon its lease property and produced and sold 1427 tons of refined borax. *No sooner had we started production than a most drastic cut in price of borax occurred.* * * * This was the lowest price in the history of the borax business. Soon thereafter it was cut even more, until finally the price was reduced to \$18 per ton. Our cost of production was \$26 per ton, and therefore it was impossible for us to continue to operate and produce borax. * * *

"The reason our competitor [i.e., P.C.B. (R. 602)] has been able to maintain this low price is because of *his illegal acquisition* in 1926 of the most valuable and most economical source of sodium borate in the world * * * known as the Kramer Borax Deposit." (R. 601)

"Therefore, by illegally acquiring a source of cheap borax supply our competitor, the Pacific Coast Borax Company, have made it impossible for us to produce borax at a profit at present prices.

"It is not fair nor just that the Government should now take steps to cancel our lease upon Searles Lake due to the non-payment of our rent, or the non-production of the minerals thereon when the cause of such default is due to the *false and deceitful action of our competitor, whose main object is to get patent to sodium borate lands and to drive out all competition and hold a monopoly of the borax business.* Nor is it fair that the Government continue to the end that *the borax trust* can obtain continued ownership and thereby drive out of business a Government lessee, such as ourselves, who must pay a royalty on production and who obtains its lands and mineral deposits by legal and lawful methods."

* * * * *

"For six years we have been defending the interests of the people of the United States against the illegal practices of the borax trust. We had to carry on our battle with meager funds, whereas, the borax trust had unlimited money at its disposal." (R. 603)

In November, 1934, plaintiff wrote another letter to the Secretary of the Interior (Def. Ex. V, R. 605) and said in it:

"Immediately upon our entering into the production of borax the price of borax fell * * * below our cost of production * * * so we had to shut down.

"There are only three principal producers of borax in the world today, namely, the Pacific Coast Borax Company and the American Potash & Chemical Company, both controlled by English capital and known as the Borax Trust. In fact, they may be classed as one producer, since they both operate under English control. The West End Chemical Company at Searles Lake is the third producer. There are no other borax producers, because they have now all been bought out by the Trust." (R. 605)

(e) Plaintiff's Distrust of Defendants' Honesty, 1934-1936.

On October 11, 1934 plaintiff again consulted its attorney Townsend (R. 587) and was told that PCB in its efforts to

obtain a patent from the government on certain land in the Kramer District "had been guilty of concealing facts from the government" and that "they were not honest and above-board" (R. 588). Burnham believed this (R. 588).

In February 1936 the plaintiff consulted a Los Angeles attorney named Hess who suggested that the granting of a patent on the Little Placer to defendant United States Borax Company might be the result of fraud on the part of that defendant (R. 589, 590).

(f) Plaintiff's Communications with Senator Pittman and Accusations Against Defendants, 1936-1937.

Later in 1936 Burnham was in correspondence with Senator Key Pittman, Chairman of a Subcommittee of the United States Senate Committee on Public Lands and Surveys, investigating the potash industry. Plaintiff took some credit for having Senator Pittman introduce the resolution for the investigation (R. 739, 740). In the years 1925 to 1929 George Burnham had repeatedly talked to Senator Pittman about the fraud order (R. 764, 765), and in 1936 he told Senator Pittman about the price cuts of 1928 and their effect upon the plaintiff (R. 765, 766).

In September 1936 Senator Pittman by letter (Def. Ex. S, R. 591) requested plaintiff for a statement, and it replied on October 20, 1936 (Def. Ex. T, R. 593, 594), saying:

"Foreign-owned corporations are practically the only producers of potash in America. They are also the principal producers of borax and are spoken of as the English Borax Trust. The world's potash market is controlled by the German Potash Trust and apparently the English Borax Trust cooperates with the German Trust in the control of the market. As soon as any Government lease begins producing potash the Trust will no doubt cut the prices of potash and the lessees should have some kind of government protection against such competition. A similar situation occurred when we started producing borax. The very

month we started on borax production, drastic cuts in the price of borax occurred.” (R. 594)

* * * * *

“The very month we started operations saw the beginning of a price war between the two largest producers of borax (both English controlled corporations) [i.e., AP&CC and PCB (R. 595)], which drove the selling prices down to the unbelievable price of \$18 per ton F.O.B. plant. * * * No producer could make profits at that price and a new company like ourselves without financial reserves could not continue indefinitely to carry the losses entailed in operation. It would almost appear that *the cut in price of borax was purposely timed to start the very month we started borax production.*” (R. 594, 595)

(g) Plaintiff Consults New York Attorney About Suing Defendants, 1938.

In 1930 plaintiff had obtained a temporary injunction in the Carson City suit against the Postmaster, but the action was dismissed for lack of prosecution in 1935 (cf. p. 41, *infra*). In late 1937 and early 1938 “three things occurred which revived [plaintiff’s] belief as to the responsibility of these companies [defendants] for the price cut and the damage to [it]”: first, the Post Office renewed enforcement of the fraud order; second, plaintiff’s “lease had been terminated by the Department of the Interior”, and third, “an appeal * * * to the President of the United States had been denied” (R. 609, 610).

Therefore plaintiff decided to “consult an attorney about any possible claim [it] might have against the Pacific Coast Borax and the allied companies and the American Potash & Chemical Company with respect to the damage done it as the result of the price cuts in 1928” (R. 609), and in January 1938 one of its New York stockholders suggested to Burnham that he employ Mr. William Stephens, a New York attorney, “in connection with a possible suit against these defendants American Potash & Chemical Company and Pacific Coast Borax” (R. 611). Plaintiff also contemplated having “a noted writer who is opposed to trusts” write plaintiff’s history (R. 610).

On May 10, 1938, Burnham did consult Mr. Stephens (R. 611, 612) and "unburdened his troubles to him", among them being "the price cuts of 1928" (R. 613), as Burnham then believed that the price cuts of 1928 were collusive and designed to injure plaintiff (R. 614). He told Stephens "that the price cut had occurred in June 1928, at the very time [he] started production" (R. 615), and Stephens was quite "impressed" with the simultaneity and timing of the price cuts and expressed the view, "that is a remarkable coincidence * * * and it might indicate some violation of the law" (R. 615), but told Burnham that probably plaintiff was barred by the statute of limitations from suing the defendants (R. 615).

(h) Muir Monograph—"People of the United States v. Foreign-Owned Monopoly," a "History of the Burnham Chemical Co."—May 1938.

In May 1938, one of plaintiff's stockholders, Muir, prepared a monograph entitled "People of the United States vs. Foreign-Owned Monopoly" and gave it to Burnham (R. 616-617). As we have seen (p., supra), in 1939 plaintiff sent a copy to Thurman Arnold calling it "really a history of the Burnham Chemical Co." This document (Def. Ex. AH, R. 662), is wholly destructive of plaintiff's claim of fraudulent concealment. It is 35 pages long, and relevant passages were read into the record (at R. 662-681). We summarize and quote portions below:—

"Seven thousand American citizens, mostly people of small means, bought treasury stock in the Burnham Chemical Co. in the hopes of sharing in some of the profits. But the borax industry was in the control of an English-owned borax trust and a competitor would be detrimental to the trust. So it happens that every time the infant enterprise made a little progress, the monopoly, or even some Government official, would hit the struggling infant over the head and down it would fall. * * *

"Now, who are they 'in and out of the halls of Government who encourage the growing restriction of competition?' Who are these people who are aiding monopoly in order that the rich can get richer and the poor get poorer?

"Let us describe some of these potash and borax deposits and recite a little of the history of this Burnham Chemical Co." (R. 662, 663)

* * * * *

"* * * The Pacific Coast Borax Co. sell the 20 Mule Team brand of borax, the only package borax on the market, because *the borax trust has apparently forced all others out of the field of competition.*"

The monograph then describes the placer locations on Searles Lake, "found to contain numerous deposits of borax", and states that a company was formed to develop the property, but "The control of the company fell into the hands of another British corporation in 1909 [AP&CC's predecessor]. The principal borax production of the world is made by these two British interests [AP&CC and PCB]. Probably at the start these two companies were separate competing companies, but today *it is believed that an office in London controls the two companies.*" (R. 663, 664)

The monograph then describes the granting in 1918 of government leases on Searles Lake, some to George Burnham, and relates that Burnham was then working for PCB which put up for him the necessary bond with the Department of the Interior, but that when it appeared that his experiments would be successful, PCB discharged him and refused to finance him.

"But the making of large amounts of potash would also result in the production of large amounts of cheap borax and that would be detrimental to the borax trust. So, Mr. Burnham was discharged from the employment of the Pacific Coast Borax Company." (R. 665, 666)

The monograph continued that PCB in 1919 through a subsidiary tried to acquire large acreage at Searles Lake to utilize the process of solar evaporation.

"Thus, the Borax trust put itself on record to show that it realized the great possibilities of solar evaporation and the economies that could be effected. * * * *But apparently*

the trust reasoned 'why develop a cheap process unless it can control its use?' They reasoned that unless they had a large part of Searles Lake solar pond land they did not desire to encourage production by solar methods as it would only invite competition. Therefore, when they were denied this solar pond land as a result of the protest of Mr. Burnham, and the other lessees, the borax trust took no further steps to develop the solar process * * *. All the evidence points to a policy of the trust to either control the entire situation at Searles Lake, or else do nothing at all in hopes that no one else would do anything." (R. 666, 667)

All this, according to Muir,

"also shows that Mr. Burnham was double-crossed. The trust wanted to use his process, but did not want to pay him anything for it.

*"Their application also indicated an attempt to defraud the Government of royalties from production. * * * It certainly shows the character of the Trust, as wanting to grab it all and pay the Government nothing."* (R. 667)

The monograph then describes the Post Office fraud order and blames it on defendants and Stephen Mather acting as their instrument.

"The financing of the company was going along rapidly when the Post Office Department of the United States Government, apparently inspired by misinformation and evidently influenced by Stephen T. Mather, of the Department of the Interior and who was associated with the trust, imposed a Post Office Fraud Order upon the Company." (R. 668)

The document then quotes the Stephen Mather letter (see page 19, *supra*) and says:

"The main point about the letter is that Mr. Stephen T. Mather admits that he was responsible, in a measure, for having the fraud order issued. In other words, the president of a competing borax company, a subsidiary of

the Pacific Coast Borax Co. and a man who held a high position in the Department of the Interior admits he was in a measure responsible for having a post office fraud order issued against a competitor.

"Mr. Mather speaks of having found the literature in London. The head office of the Borax Trust is located in London. Did the head office bring the literature to his attention?" (R. 668, 669)

"Mr. Mather sets up nothing in his letter that shows there was fraud committed. He could find no fraud. *The only thing that worried him was that the Burnham Chemical Co. was a competitor to the Borax Trust with whom he was associated and their production would mean competition to his company and a loss of profits to himself.*" (R. 669, 670)

The monograph then discusses "Price Cutting of Borax". It states that despite serious crippling from the fraud order plaintiff revised its plans and managed to raise funds to complete a borax unit, which

"thus enabled the Company to begin production of borax in June 1928, just three costly years after the Fraud Order was imposed. * * * At last it looked as though the troubles of the Company were over. The borax plant was rehabilitated and completed in the spring of 1928, and in June actual production of borax was started. *But the very month the Company started operation saw the beginning of a price war between the two largest producers of borax (both English-controlled corporations) which drove the selling prices down to the unbelievable price of \$18.00 per ton F.O.B. plant. Borax had never sold for less than \$60.00 a ton before and this was some \$40.00 lower than borax had ever sold before in its history. No producer could make profits at that price and a new company like the Burnham Chemical Co., without financial reserves, could not continue indefinitely to carry the losses entailed in operation. It would appear that the cut in price of borax was purposely timed to start the very month the Burnham Chemical Co. started borax production. Did the two English borax pro-*

ducers conspire to start a price war the very month the Burnham Chemical Co. started production? Were the two companies price war directed by a common management in London?" (R. 670, 671)

The monograph notes that the Burnham company obtained a temporary injunction against the Postmaster in 1930, that suit was dismissed for lack of prosecution in 1935, and that "apparently the Post Office had forgotten all about the matter" until "in September, 1937, the Fraud Order was reinstated." (R. 672) As an explanation why the fraud order was reinstated, it then describes the efforts of defendant United States Borax Company to obtain patents on borax lands in the Kramer area of Kern County, beginning in 1926, and charged that that defendant obtained its patents by fraud:

"Thus the evidence shows that the foreign-owned interest deceived the Government as to the nature of the deposits and Mr. Austin was induced to withdraw this application so that the Borax Trust could get ownership to the deposits and thereby deprive the Government of royalties.

*"The Burnham Chemical Co. has contested the matter of ownership to some of the valuable sodium borate deposits in this Kramer borax district but it has been of little avail. * * **

*"The Government was evidently deceived as to the true nature of these deposits. * * * In my opinion, the Austin sodium applications and their withdrawal, and the prosecution of patent to the land, and the withholding of information from the Government that sodium borate was found, is fraud, and it is the most cunning example of deception practiced upon the Government in the history of land office transactions. Not only was the Government injured and consequently the People of the United States, but it enabled the Trust to grow more and more wealthy and to cut the price of borax and drive the Burnham Chemical Co. out of business." (R. 673, 674)*

The monograph then purports to describe how defendants went about acquiring "the Carlsbad potash deposits" and

charged that "apparently as a reward for assisting them," "Horace M. Albright, head of the National Parks Service of the Department of the Interior, * * * was * * * given the position of Vice-President and General Manager of the United States Potash Co. *What stronger evidence than that could one want to show that there are people in the Halls of Government who have been taking active efforts to help this monopoly to get control of the potash and borax in this country?*" (R. 675)

At this point the monograph quotes a letter written on July 17, 1937, by a Stockholders' Committee of plaintiff to President Roosevelt, wherein the President was told:

"Again the Government granted ownership to the largest sodium borate deposit in the world to the *Borax Trust*, a foreign-owned concern, contrary to the law and the intention of Congress *giving the trust a strangle hold on the borax industry and enabling them to drive us out of the competitive field, at the time we started our production.*" (R. 676)

The Muir monograph concluded that the reason for the reinstatement of the postal fraud order in 1937 was that defendants utilized someone in government service to bring it about in order to punish plaintiff for its opposition to defendants' acquisitions in Kern County. *Plaintiff was fully convinced of this fact*, for the monograph continued with an essay on "Evidence by Induction", saying:

"Through inductive evidence one can reason that when foreign-owned companies get all the breaks and yet 7000 American citizens get all the knocks there must be some one in the Halls of Government that is helping the foreign-owned interests and deliberately blocking the efforts of 7000 American citizens.

* * * * *

"What stronger evidence would one want to show that the British Borax Trust itself was behind the various steps that have been taken to defeat the Burnham Chemical Co.

and that it used the Government as a tool to accomplish it; that it induced the Post Office to issue a Fraud Order against the Burnham Chemical Company in order to eliminate a competitor, when Stephen T. Mather, a member of the Borax Trust, admits that he was, in a measure, responsible for the Fraud Order?

* * * * *

"* * * it is inconceivable that our Post Office Department would issue a Fraud Order against the corporation and destroy the investment of 7000 stockholders without first asking the corporation to change any statement the Government thought was incorrect. A fair-minded Government would not do such a thing and *therefore it must have been the Borax Trust behind the Fraud Order, just as Stephen T. Mather's letter shows.*" (R. 678-680)

(i) Plaintiff's Repeated Accusations Against Defendants to Government Officials—1939.

In August 1939 Burnham again went east, taking with him copies of the Mather letter, Townsend's letter of 1928 and the Muir monograph (R. 616), because he thought them to be important (R. 648).

Burnham again conferred with his attorney, Mr. Stephens, in New York (R. 617) and called on Mr. Wendell Berge of the Antitrust Division of the Department of Justice. In November, as we have seen, he wrote to Thurman Arnold. Burnham admitted that this letter stated substantially what he had earlier told Berge (R. 623, 625), and that what he had told Mr. Berge he had already told Senator Key Pittman in 1936 and 1937 (R. 624, 625). Thus, the Thurman Arnold letter (quoted at pages 9-11, *supra*) summarizes plaintiff's accusations made to Senator Pittman in 1936.

In November and December 1939 and January 1940 plaintiff wrote other letters that are significant because they demonstrate plaintiff's positive conviction that the 1928 price cuts could not be explained by increased production of borax or the discovery

of new and cheaper sources of supply or methods of production, but only by conspiracy of defendants aimed at plaintiff. On November 18, 1939, plaintiff wrote to the Secretary of the Interior (Def. Ex. H, R. 484), from which we have already quoted passages (p. 20, supra). This letter also said:

"As President and Stockholder of the Burnham Chemical Company and as a citizen of the United States I protest the granting of any further potash lands, through lease or otherwise, to the American Potash & Chemical Company * * *. The reasons for my protest are as follows:

"(1) The American Potash & Chemical Corporation and other fertilizer producers are now being investigated by the Antitrust Division of the Department of Justice for alleged violation of the Sherman Antitrust Laws. This corporation is a foreign-owned Company with about 80 per cent of its stock held by foreign citizens residing in England. *The corporation, together with another British-owned potash and borax producer in the United States [i.e., PCB, (R. 619)] constitute a formidable monopoly of the potash and borax industry of this country.*" (R. 618, 619)

* * * * *

"The Burnham Chemical Company was granted a lease on lands at Searles Lake. * * * It proceeded with the development of its lease by raising money through the mails. * * * the Post Office issued a fraud order against the Company, in 1925, denying it the use of the mails. Our supply of funds, the lifeblood of the Company, was cut off. * * * However, the Company did manage to raise sufficient money to build part of its plant and produce borax; and 1,400 tons of 99½ per cent pure borax was produced. But, the very month our production started, in June, 1928, the American Potash & Chemical Corporation and the Pacific Coast Borax Company, both foreign-owned companies, began cutting the price of borax from approximately \$60 per ton f.o.b. Searles Lake to about \$18 a ton. Our cost of production was \$26 per ton, so, when the price fell below \$26 we were losing money—and we

had to close down our plant. After we stopped our small production the price went up. * * * we were unable to pay even the rent on the lease, and, therefore, the Department of the Interior cancelled our potash lease.

"* * * It is evident that the foreign-owned borax interests realized that if the solar methods of production got an adequate start they could become serious competitors to themselves; it would break the British Monopoly of the potash and borax industry in this country; and so this drastic cut in the price of borax was aimed at us, to drive the cheaper methods of production from the field. The new source of borax in the Kramer Borax fields was the excuse of the Borax Trust for cutting the price of borax, but that field had been in production for a year before we started production. Furthermore, after we stopped our small production, the price went up. * * * Foreign interests drove us out." (R. 618-621)

Plaintiff knew in 1928 that the Kramer borax fields had been in production a year before plaintiff started production and that AP&CC's Searles Lake production had already doubled in 1927 (R. 647). The significance of these facts had *always been with* it as showing that the new Kramer field could not be the real reason for the price cuts (R. 622).

The letter also referred to the Carlsbad Potash Leases and Mr. Horace M. Albright's employment (cf. Muir Monograph, pp. 41, 42, *supra*), and asserted:

*"This incident shows a further connection between foreign-owned interests and Government officials which lead us to believe the foreign-owned interests have more than once used their influence in the Halls of Government to drive out American competition * * *." (R. 623)*

On December 8, 1939, Mr. Pearce, Special Assistant to the Attorney General in charge of antitrust matters in New York City, by letter asked plaintiff for "any documentary evidence which you may have in your possession sustaining the views ex-

pressed" in the letter to Thurman Arnold (Def. Ex. W, R. 631). On December 18, 1939, the plaintiff replied (Def. Ex. X, R. 632):

"I do not know just what documentary evidence you desire, but in case you want to know the prices to which borax was cut in 1928 this information can be obtained from * * * the Secretary-Treasurer of the Burnham Chemical Co. * * *

"In case you desire to see the letter of Oct. 8, 1926, from Mr. Stephen T. Mather to Mr. Whitney, that is in the possession of Mr. Whitney * * *.

"* * * we could have made a substantial profit if the price of borax had remained up. *The very month we started production in June, 1928, the price war on borax started.* Our borax was 99½% pure and was made by the solar evaporation of the Searles Lake brine. We required no expensive fuel oil to evaporate the brine as do the American Potash & Chemical Co. But our process was patented and they did not want us to succeed; so they started the price war." (R. 632-634)

What plaintiff here wrote to Mr. Pearce it had already told Mr. Berge (R. 635) and to Senator Key Pittman in 1936 and 1937.

On January 5, 1940, plaintiff again wrote to Mr. Pearce (Def. Ex. Y, R. 636) and emphasized:

"The price cutting on borax, mentioned in my December 18, 1939, letter to you occurred in June, 1928. The price cutting drove the Burnham Chemical Co. out of business and prevented us from building up a plant to produce potash, borax and other chemicals at Searles Lake, California * * *.

"* * * *In other words, the price of borax was cut in half at the plant the very month we started production.* About three months later it was down to about \$18.00 per ton f.o.b. plant.

"On page 389 of the June, 1928, issue of Chemical and Metallurgical Engineering Magazine, the following statement is made:

'Among important price changes in market for chemicals during the past month was a drastic decline in quotations for borax and boric acid. Improved processes by which production costs have been lowered is given as the reason underlying the price change.'

"The statement that improved processes caused the price reduction does not entirely fit into the facts. The newly discovered borax deposits in the Kramer Borax District, California, in 1925 no doubt has had some influence on the price of borax, but the Kramer field was producing borax for about a year and a half before we started production. The processes at Kramer and Searles Lake were fairly well established. Yet the very month we started production they cut the price in half. If the processes were being improved you would expect a more gradual lowering of price. I will be glad to go into this in more detail with your representative when he calls."

(R. 637, 638)

In January 1940 Burnham conferred with the Department of Justice in San Francisco, and on January 30, 1940, wrote to it (Def. Ex. Z, R. 639), emphasizing:

"As mentioned in my letter of January 5, 1940, to Mr. Charles C. Pearce of your New York office, the price of borax dropped * * * in June 1928. The enclosed photostat copies of pages in the 'Chemical and Metallurgical Engineering' magazine for June, 1928, show a drastic cut in price for borax for that month compared to the previous month.* * * *That was the very month we started our borax production, June, 1928. We continued our production until January, 1929, and we were then forced to shut down due to price cutting. From stocks of borax on hand we continued to sell borax until the fall of 1929. During this period the price of borax continued to fall still more.*

* * * * *

"By the fall of 1929 all the borax stored in our warehouse was sold. We were shut down and without funds to renew operation because we had been forced to sell borax below cost of production. So in November, 1929, since we had been forced out of business, the market price of borax went up. * * *

"As long as we threatened renewal of our production or had stocks of borax on hand, the price stayed down, but when all our borax was sold and we were eliminated as a competitor the price went up. We were a potential producer of potash and therefore when we were eliminated as a borax producer we were also eliminated as a future potash producer.

"Another interesting point to consider is that this price increase took place in November, 1929. Yet about two months prior to that time the financial crash of 1929 had started. The world-wide depression had begun with tumbling stock market prices. In spite of the fact that one of the biggest depressions in history was upon the world, the Trust raised the price of its borax. That is further evidence that the rise in price was because we were eliminated as a competitor." (R. 639-641)

The fact that the price had risen just as soon as plaintiff had sold all its borax was known to it ever since it occurred in 1929 (R. 642), and plaintiff had "realized long before 1939 that the fact might have a peculiar significance" (R. 648, 649).

On January 13, 1940, plaintiff wrote to its stockholders (Def. Ex. AG, R. 654) and said:

"Last August I wrote you about the Burnham Chemical Co. I mentioned a hearing in Washington, D. C., on September 12, 1939, which I planned to attend. I attended the hearing and I am convinced that the Government is beginning to take our view regarding the disposition of certain valuable borax deposits in the Kramer Borax District, California.

"For some time I have talked about the British-owned potash and borax interests getting most of the potash and borax deposits in this country and driving out American competition. Well! Now the United States Department of Justice is investigating the potash producers of this country for their alleged violation of the Sherman Anti-Trust laws."

In this statement that "for some time" he had been talking about the British-owned borax interests getting the borax deposits in this country and driving out American competition, Burnham referred to "the whole period of the time when we were driven out of production * * * since 1929."

5. PLAINTIFF'S DELAY IN SUING WAS DUE TO LACK OF FUNDS.

The simple fact is that plaintiff's long delay in filing suit was due to lack of funds. Thus, although it had filed its suit against the Postmaster in 1925 and its Amended Complaint in 1926, it did not bring its application for temporary injunction to hearing until 1930, primarily for lack of funds (R. 657). Similarly, although it was convinced that it had a good patent infringement claim against AP&CC and served notice of infringement, it never filed suit because of lack of funds (R. 658, 659).

In the letter to Thurman Arnold in November, 1939, plaintiff stated that it had been advised by its attorney Townsend in 1928 and was convinced that it had a good case against the defendants for violation of the antitrust laws but it had no funds to proceed (see p. 10, *supra*). And Burnham testified:

"Q. Why was it, Mr. Burnham, that the plaintiff, Burnham Chemical Company, was unable to employ Mr. Townsend or Mr. Heney to continue the investigation in search for evidence to support your charge after 1929?

"A. Because we were practically broke and what money we did have was sent to us by our stockholders for other purposes." (R. 660, 661)

The "charge" here referred to is "the charge of conspiracy in violation of the antitrust laws", "the charge that these defendants had injured [plaintiff] in violation of the Anti-Trust Laws" (R. 661).

6. DEATH OF WITNESSES AND PARTIES.

In the many years elapsing before this action was brought, numerous witnesses who might challenge Burnham's claims have

died. Mr. Stephen Mather, Judge Heney, B. D. Townsend, R. C. Baker (president of the PCB group and the man in charge of it, R. 537), Senator Pittman, Mr. Whitney—all are dead (R. 659). Zabriskie died in the early 1930's (R. 537).

APPELLEES' CONTENTIONS

Appellees contend

- (1) that on the face of the complaint the action is barred by the statute of limitations, and
- (2) that under the evidence it is indisputably so barred.

DISCUSSION

I.

The Applicable Statute of Limitations Is Section 338, Subdivision 1, California Code of Civil Procedure; the Period Is Three Years; and the Statute Begins to Run as to Any Item of Damage From the Overt Act Producing It.

A. THE STATE STATUTE OF LIMITATIONS APPLIES.

The state statute of limitations applies to treble damage suits by private parties under the federal antitrust laws.

Chattanooga Foundry and Pipe Works v. City of Atlanta,
203 U.S. 390;

Foster & Kleiser Co. v. Special Site Sign Co., 85 F.2d
742 (9 Cir.), cer. den. 299 U.S. 613,

and numerous other cases cited below.

An Action to Recover Treble Damages Under the Antitrust Laws Is an Action at Law, Not a Suit in Equity

Appellant urges on this Court a contention never made in the District Court. It argues that this is a suit in equity, and since, under *Holmberg v. Armbrecht*, 327 U.S. 392, no statute

of limitations applies to suits in equity in federal courts, appellant argues that no statute of limitations applies to this case.

But a treble damage suit under the antitrust laws is not a suit in equity. It is an action at law, and a tort action. This is not only the necessary implication of all antitrust cases involving the statute of limitations wherein it has been universally held that the state statutes govern, but it has been held expressly. In *Fleitmann v. Welsbach Co.*, 240 U.S. 27, involving a bill by a stockholder of a corporation against defendants to compel payment of treble damages under the Sherman Act, the court held that the action was not in equity but at law. The court, through Mr. Justice Holmes, said (pp. 28, 29):

"Of course the claim set up is that of the corporation alone, and if the corporation were proceeding directly under the statute no one can doubt that its only remedy would be at law. * * *

"* * * we agree with the courts below that when a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law. On the contrary it plainly provides the latter remedy and it provides no other."

To the same effect, *Meeker v. Lehigh Valley Railroad Co.*, 162 Fed. 354:—"This is an action at law, * * *" (p. 357). And so also in *Hartford-Empire Co. v. Glenshaw Glass Co.*, 3 F.R.D. 50, where it is said: "It has been held by the United States Supreme Court that an action for damages for violation of the antitrust laws is an action at law triable by a jury as of right."

In *Connecticut Importing Co. v. Frankfort Distilleries*, 101 F.2d 79, 87 (2 Cir.), the court said: "This is not a suit in equity * * *," and several courts have had occasion to state the obvious, that the action is in tort. *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F.2d 580, 583 (8 Cir.); *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, 138 F.2d 967, 970 (7 Cir.)

Holmberg v. Armbrrecht, *supra*, itself recognizes that the action

is at law. At page 37 of its brief, plaintiff quotes from that case as follows:

"Apart from penal enactments, Congress has usually left the limitation of time for commencing actions under national legislation to judicial implications. As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitations (*citing cases*)."

Significantly, in quoting this passage, plaintiff omits the citations substituting the phrase "citing cases", but one of the citations so omitted by plaintiff is *Chattanooga Foundry etc. v. Atlanta*, 203 U.S. 390, a treble damage suit under the Sherman Act, in which the court held that the state statute of limitations applied.

The apparent basis of plaintiff's contention that this is a suit in equity is (Brief, pp. 22, 39) that somehow fraud is involved. Even were fraud involved, that would not make a case a suit in equity; e.g., an action for damages for fraud is an action at law. Moreover, an action for damages under the Sherman Act is not an action for fraud at all, and where "fraudulent concealment" is urged as tolling the running of the statute of limitations, fraud is not the gravamen of the action and is no part of the cause of action. *Foster & Kleiser Co. v. Special Site Sign Co.*, supra; *State of Oklahoma v. American Book Company*, 144 F.2d 585 (10 Cir.).

The plaintiff seems to suggest that the *Holmberg* case was a suit in equity because fraudulent concealment was involved. Such is not the fact. That was a suit by creditors of an insolvent Land Bank under Section 16 of the Federal Farm Loan Act to enforce stockholders' liability for the bank's debts. Such a proceeding is a suit in equity because, as said in *Russell v. Todd*, 309 U.S. 280 at 285:

"As the liability of the stockholders as prescribed by this section is to pay 'equally and ratably,' the sole remedy is by plenary representative suit brought in equity in behalf

of all creditors of the bank, in which the existence and extent of insolvency, and the ratable shares of the contribution by shareholders can be ascertained and an equitable distribution made of the fund recovered.”¹⁰

The Farm Loan Act, unlike the National Bank Act, confers no power on the receiver to levy an assessment or to sue to enforce statutory liability (*Wheeler v. Greene*, 280 U.S. 49), and therefore the only mode of enforcement of the liability is a creditor’s bill in equity. *Christopher v. Brusselback*, 302 U.S. 500 at 502.¹¹

Plaintiff’s Contention Is Inconsistent with Its Position Below

Plaintiff’s present contention was never even suggested in the court below. Plaintiff admitted below that the state statute of limitations applied. Thus at the pre-trial conference of December 2, 1946, plaintiff’s counsel said:

“We are suing under Section 15, the treble damage section * * *. *There is no question but what on the bare statement of all the facts, the statute would have run unless we did allege and prove some excusatory facts.* [R. 300, 301]

* * * * *

10. The passage quoted continued thus:

“But this amount cannot be determined and its distribution effected with resort to the procedures traditionally employed by equity upon a bill for an accounting and for the distribution of a fund brought into its custody. No stockholder is liable for more than his proportion of the debts not exceeding the par value of his stock. His proportion can be ascertained only upon an accounting of the debts and of the stock and a pro rata distribution of the liability among the shareholders and of the proceeds of recovery among the creditors. Such a suit during its progress and at its conclusion by a final decree of distribution requires the exercise of powers which are peculiarly those of a court of equity to bring before it in a single suit all the necessary parties to ascertain their rights and liabilities, and to adjust and settle them by its decrees.”

11. The only other case cited by plaintiff to support its contention that this is a suit in equity is *Benedict v. City of New York*, 250 U.S. 321, which was, however, a suit on an express trust.

"* * * what we believe, your Honor, is this, that the matter stands, *and it is our position that unless we can make good our excusatory allegations, of course, the statute will have run * * **" (R. 302)

Again, at the pre-trial conference of January 16, 1947, the following colloquy occurred between court and counsel for plaintiff (R. 266, 267):

"The Court: There is another question also that I think would have to be decided, and that is, who would go forward to present the evidence first on this issue? * * * There must be a preponderance of evidence, according to all rules, to be borne by him who has the burden of proof. I will be glad to decide that unless you gentlemen can agree between yourselves as to that.

"Mr. Carr: *I think we should, because we are advancing facts which we claim tolled the statute of limitations, and I think that burden does rest with us.*" (R. 266, 267)

Plaintiff's counsel also said at the same time (R. 306):

"Our only defense to the statute of limitations is the excusatory allegations which we have in our complaint and coming under those California cases of fraud and concealment."

Furthermore, as we have already noted, it was the plaintiff which suggested to the District Court that it order a separate trial on the statute of limitations (p. 5, *supra*), and it was the plaintiff which demanded a jury trial (p. 6, *supra*), and a jury trial was granted because, the action being at law, plaintiff was thought to be entitled to a jury as of right.¹²

B. THE APPLICABLE STATUTE IS C.C.P. SECTION 338, SUBDIVISION 1, AND THE PERIOD IS THREE YEARS.

The action is one upon a liability created by statute other than for a penalty or forfeiture.

12. As said by the trial court:

"You have requested a jury trial in this case, which is your right, as to this special issue, and you have it." (R. 448)

"The Court: But, Mr. Carr, you demanded a jury, if I remember rightly, to hear this factual question as to whether the cause of action was barred by the statute of limitations." (R. 812)

Foster & Kleiser Co. v. Special Site Sign Co., 85 F.2d 742 (9 Cir.);

Momand v. Universal Film Exchange, 43 F.Supp. 996;

Hansen Packing Co. v. Swift and Co., 27 F.Supp. 364.

Consequently, as this Court held in the *Foster & Kleiser* case, the applicable statute in California is Section 338, Subd. (1) of the *California Code of Civil Procedure*:—"Within three years: 1. An action upon a liability created by statute, other than a penalty or forfeiture."

C. THE STATUTE BEGINS TO RUN SEPARATELY AGAINST EACH ITEM OF DAMAGE AND NOT LATER THAN THE DAMAGE ITSELF OR FROM THE OVERT ACT PRODUCING THAT DAMAGE. THE THEORY OF CONTINUING CONSPIRACY HAS NO APPLICATION TO A PRIVATE SUIT FOR DAMAGES.

Plaintiff argues that its action is one for conspiracy and that the statute of limitations does not begin to run as long as the alleged conspiracy continues or some overt act occurs, even though that act has no relation to the plaintiff or caused no damage to it. In this the plaintiff errs and is confused in trying to import into a private damage suit the rule applicable to criminal prosecutions for violations of the antitrust laws.

In a criminal case, so long as there is a conspiracy within the period of limitations, there is a punishable crime. But a treble damage suit by a private party is not brought to vindicate the law. The gravamen of such an action is not the conspiracy—the wrong to the public—but the damage suffered by the plaintiff. Therefore there must be overt acts, for without overt acts there can be no damage, and, although the overt acts may acquire the taint of illegality because of the conspiracy, the private plaintiff's right to recover is based on the acts done *to his damage*.

Plaintiff's principal reliance in its continuing conspiracy theory is the case of *United States v. Kissel*, 218 U.S. 601. But that was a criminal case, and all the other cases cited by plaintiff in its

brief on the subject are likewise criminal cases. This Court in the *Foster & Kleiser* case, *supra*, expressly held the *Kissel* case inapplicable to a treble damage suit. The United States Supreme Court denied certiorari (299 U.S. 613), and the *Foster & Kleiser* decision has been repeatedly approved by every court which subsequently has had to apply the statute of limitations to private suits under the Sherman Act.

In the *Foster & Kleiser* case, this Court held (pp. 750, 751) that "The fact that there may be a criminal conspiracy does not give plaintiff an action for damages"; the right of action, unlike in a suit by the government, criminal or civil, lies not in the conspiracy but in injury to the particular plaintiff resulting from particular overt acts. This Court further said (p. 750):

"In a civil action for damages sustained because of a conspiracy in restraint of trade, the right of recovery is not based upon the conspiracy, but upon the injuries resulting therefrom. * * * The gist of the action under this section is for injuries inflicted pursuant to the conspiracy for which the wrongdoer is liable. *Morris & Co. v. Nat'l Ass'n of Stationers* (C.C.A.) 40 F.(2d) 620. *The cause of action arises when the damage is sustained and the statute of limitations begins to run at that time.* *Bluefields S. S. Co. v. United Fruit Co.* (C.C.A.) 243 F.1, 20. * * *

"Under this decision, in a civil action for damages under the Sherman Anti-Trust Act, a plaintiff may recover only such damages as have been sustained within the applicable period of limitations immediately preceding the filing of the action."

The statute runs from the date the damage was incurred (*Bluefields S. S. Co. v. United Fruit Co.*, 243 Fed. 1); indeed, the statute runs as to each item of damage from the date of the last overt act causing that damage to the plaintiff; if there are more than one overt act causing damage, the statute runs on each separately. See thorough discussion in *Momand v. Universal Film Exchange, Inc.*, 43 F. Supp. 996 at 1006, et seq.; also *Glenn Coal Co. v. Dickinson Fuel Co.*, 72 F.2d 885 at 888

(first col.) and 890 (4 Cir.); *Momand v. Paramount Pictures Dist. Co.*, 36 F. Supp. 568; and *Strout v. United Shoe Machinery Co.*, 208 Fed. 646, at 650 (cited in the *Foster & Kleiser* case).

In *Momand v. Universal Film Exchange, Inc.*, 43 F. Supp. 996, Judge Charles Wyzanski carefully stated the law on the subject in a decision rendered by him after special trial on the statute of limitations. He said (at p. 1006):

"Under the law of the United States private causes of action for damage suffered from violations of the anti-trust law may accrue at different times, depending upon the type of violation. * * * In the single violation type of case, the moment the plaintiff's interest is invaded he is entitled to sue for damages not only on account of the injuries he suffered at once but also on account of those he will suffer in the future from the defendant's wrong, including what he has suffered during, and will suffer after, the trial. * * *

"* * * Each time the plaintiff's interest is invaded by an act of the defendants, he has a new cause of action. For that particular invasion he is at once entitled to recover as damages, not only for the injuries he suffers at once, but also for those he will suffer in the future from that particular invasion, including what he has suffered during and will suffer after the trial. * * *

"When those new invasions occur, new causes of action will accrue and a new period of limitation applicable to the damage from those invasions will begin. * * *

"It is not difficult to apply the foregoing principles to this case. As I have said, the plaintiff here alleges first, that the conspiracy continued up to the date of the writ, and second, that the plaintiff's interests have been invaded at different times. The first allegation is not controlling. *Even though 'a conspiracy * * * is in effect renewed during each day of its continuance'* (*United States v. Borden Co.*, 308 U.S. 188, 202, 60 S. Ct. 182, 190, 84 L. Ed. 181), *no private civil cause of action accrues from the mere conspiracy itself because standing alone a conspiracy does not*

invade any private rights. Nalle v. Oyster, 230 U.S. 165, 182, 183, 33 S. Ct. 1043, 57 L. Ed. 1439; *Foster & Kleiser Co. v. Special Site Sign Co.*, 9 Cir., 85 F. 2d 742, 751. Thus, in private suits the existence of the conspiracy as such is not the critical question in computing the period of limitation. *Northern Kentucky Telephone Co. v. Southern Bell Telephone & Telegraph Co.*, 6 Cir., 73 F. 2d 333. See, also, the cases collated in Note 97 A.L.R. 137. The critical question is on what date or dates the defendants invaded the plaintiff's interest. Cf. American Law Institute, *Restatement of Torts*, vol. IV, § 899, pp. 523-529. In the case from the Sixth Circuit just cited, it is said that the question is on what date the defendant last acted, which is perhaps another way of stating the same rule."

In *Beegle v. Thomson*, 138 F.2d 875, 881 (7 Cir.) (per Lindley, J.), the court said:

"Section 15, allowing private parties treble damages for injury accruing to their business from violation of the Anti-Trust Act, embraces, as one of the essentials to such action, injury to plaintiff's business. The complaint must affirmatively show this injury. It is not enough to allege something forbidden and claim damages resulting therefrom. Allegation of the specific injury suffered by plaintiff differing from that sustained by it as a member of the community is essential. * * * The mere existence of a violation is not sufficient ipso facto to support the action, for no party may properly seek to secure something from another without allegation and proof of facts demonstrating pecuniary loss springing from or consequent upon the unlawful act."

In *Glenn Coal Co. v. Dickinson Fuel Co.*, 72 F.2d 885 (4 Cir.), the court considered the problem pertinently thus (p. 888):

"In this case we must, therefore, carefully analyze the declaration to ascertain what act or acts of the defendants are alleged which amount to a violation of the law with

consequent damage to the plaintiff. It is alleged in the declaration with much emphasis and repetition that the defendants unlawfully combined and conspired to violate the law, and to restrain and monopolize the trade and also that their acts were unlawful, fraudulent, deceptive and accompanied by the intent to violate the law. These are, however, only general allegations and in themselves no more than conclusions of the pleader in the absence of averment of specific acts of the defendants from which it can be determined as a matter of law whether the Act has in fact been violated with resultant damage to the plaintiff. Here we find that only two specific acts are set out consisting of (1) defendants' activities with respect to the allegedly deceitfully procured exclusive sales agency taken by the Dickinson Fuel Company from the plaintiff * * *. As to the former, it appears its duration was limited to the period * * * [which] terminated more than 8 years prior to the commencement of the suit. * * * This allegation may, therefore, be dismissed from further consideration."

See, also, *Sidney Morris & Co. v. National Association of Stationers*, 40 F.2d 620 (7 Cir.); *Alexander Milburn Co. v. Union Carbide & Carbon Corp.*, 15 F.2d 678, 680 (4 Cir.); *Midwest Theatres Co. v. Cooperative Theatres*, 43 F. Supp. 216, 220; *Leonard v. Socony Vacuum Oil Co.*, 42 F. Supp. 369, 370; *Twin Ports Oil Co. v. Pure Oil Co.*, 119 F.2d 747 (8 Cir.), *cert. den.* 314 U.S. 644; *Twin Ports Oil Co. v. Pure Oil Co.*, 46 F. Supp. 149, 152.

D. PLAINTIFF'S CAUSES OF ACTION ACCRUED NO LATER THAN JANUARY 1929.

As we have seen (pp. 2-4, *supra*), the plaintiff's causes of action are predicated on damage allegedly suffered from two events, *and two only*. (a) the post office fraud order in 1924 and 1925, and (b) the price cuts of 1928. Since damage was at once suffered, the statute then began to run. Moreover, the

damage was then complete, because plaintiff was completely out of business by January 1929 (see p. 3, *supra*).¹³

In an attempt to escape the only overt acts in the case, plaintiff's brief asserts (p. 7) that its cause of action "is based upon a conspiracy formed by the defendants in the fall of 1929." Not only is that legally impossible (see pp. 55 to 59, *supra*), but an inspection of the complaint does not support the assertion. The first seventy-one paragraphs (R. 2-39) make general allegations about conspiracy *without any relation to the plaintiff* and state no cause of action in any private party. The cause of action, if any, must be found in what follows under the topic heading "As to Plaintiff" (R. 40).

Indeed, if plaintiff's contention that its cause of action "is based upon a conspiracy formed by defendants in the fall of 1929" were correct, it would have no cause of action at all because no overt acts were committed to its damage after January 1929. And by the time the alleged conspiracy in the fall of 1929 was formed the plaintiff no longer had any business to be damaged. In other words, nothing was done to plaintiff's damage under the alleged conspiracy, and the prior acts which allegedly caused its damage were not done under any conspiracy of which the plaintiff complains and therefore could not be actionable.

As a matter of fact, it is not true that the conspiracy on which the plaintiff has sued is alleged to have been formed in the fall of 1929. While the complaint does allege that the defendants entered into an agreement in the fall of 1929, it also alleges, in paragraph 66 (R. 36) that

13. Even had some damage continued to flow—contrary to the fact—the running of the statute would not have been deferred, for as said in *Northern Kentucky Telephone Co. v. Southern Bell Telephone & Telegraph Co.*, 73 F.2d 333 (6 Cir.):

"If this were not true, then it would result that, in every case where damages resulting from a wrongful act are in their nature continuing, there would be no limitation upon the right of action, and the beneficent purpose of the statute to put a period to the right to sue would be defeated." (p. 335)

"said 1929 agreement constituted a reduction to writing of the previous verbal and written agreements, understandings, combinations and conspiracies of defendants and, from time to time, made and entered into by said defendants during the years previous to the making and entering into of said agreement of 1929."

Little Placer

Plaintiff's brief refers to the allegations (R. 48-53) relative to the Little Placer claim as constituting the "last overt act." The gist of these allegations is that in 1925 certain sodium borate deposits were discovered in Kern County; that some of the defendants acquired patents from the government on all but a 10-acre plat known as the Little Placer; that the plaintiff since 1928 has sought to obtain a lease on the Little Placer from the United States Government under the Sodium Leasing Act; that some of the defendants opposed the application and sought to obtain a patent from the government under the Mineral Laws; that the Department of the Interior has declined to give the plaintiff a prospecting permit or a lease and has declined to give the defendants a patent, and that the Little Placer still belongs to the United States Government, the latter having refused either to lease or patent it to anyone.

Three things are at once obvious:

- I. If Any Claim to Damages Re the Little Placer Existed, It Would Be Barred by the Statute of Limitations.

The complaint alleges that plaintiff's application to the Department of the Interior for a prospecting permit was denied on February 9, 1929 (R. 50), and that its application for a lease was denied finally on May 3, 1933 (R. 50). What happened thereafter were merely unsuccessful attempts of plaintiff to induce the Department to reopen and reconsider and of defendant United States Borax Company to obtain a patent.

2. But No Cause of Action With Respect to the Little Placer Is Alleged, Because No Damage Is Claimed Therefrom.

The damage claimed in the complaint is the sum of \$1,168,564 (para. 81, R. 53), and this is the exact sum which plaintiff alleges that it had invested in developing its brine borax plant at Searles Lake in San Bernardino County (para. 73, R. 45). The Little Placer in Kern County is a mining deposit of ore and not part of the Searles Lake works, and there is thus no allegation of damages with respect to the Little Placer. This fact, apparent on the face of the complaint, was also frankly conceded by plaintiff's counsel, as we have seen at p. 4, *supra*.

The Little Placer allegations were inserted in the complaint solely under the erroneous theory that so long as the continuance of a "conspiracy" can be evidenced by some overt act, even though it causes no damage, the statute does not begin to run against damages resulting from earlier overt acts.

3. No Cause of Action Relative to the Little Placer Is Alleged, Even Had Damages Been Suffered.

Even if plaintiff had suffered damage from failure to receive a lease on the Little Placer, it would be a case of *damnum absque injuria*.

The decision whether the property was subject to patent under the mining laws or to the leasing acts, and, if the latter, whether to grant a prospecting permit or a lease, or to refuse to grant either, was vested by law in the Department of the Interior (30 U.S.C.A. Sec. 181, 182, 261, 262; *Oregon Basin Oil & Gas Co. v. Work, Sec. of Interior*, 273 U.S. 660, affirming 6 F.2d 676; *United States v. Wilbur*, 283 U.S. 414). The proximate cause of the plaintiff's failure to obtain a lease was the determination of the United States Government, acting through that Department. If the latter acted improperly, the plaintiff may have had a right to go to the courts in a direct attack, but it may not collaterally attack the determination of the Land Office,

nor could the District Court in this case substitute its judgment for that of the Secretary of the Interior and say that the plaintiff was entitled to a lease.

The principle in the field of malicious prosecution is wholly analogous (16 Cal. Jur. 734), that an action may not be maintained unless it appear that the alleged malicious prosecution has been terminated in favor of the party injured by it. This rule "is founded upon the necessity that proceedings in a court properly vested with jurisdiction of the parties and the subject matter shall be free from collateral attack."

A complaint states no cause of action for damages under the Sherman Act where the damages result from acts of governmental officials although "instigated and induced by the defendant". *American Banana Company v. United Fruit Company*, 166 Fed. 261, affirmed *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (per Mr. Justice Holmes), where it is said (at p. 358):

"The fundamental reason why persuading a sovereign power to do this or that cannot be a tort is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. * * * It makes the persuasion lawful by its own act."¹⁴

In *Keogh v. Chicago and Northwestern Railroad Co.*, 260 U.S. 156, the plaintiff sued under the Sherman Act for treble damages because defendant railroads had, in conspiracy, fixed rates; he was denied damages because the rates had been approved by the Interstate Commerce Commission. The court (per Mr. Justice Brandeis) agreed that, if the railroads had fixed the rates by agreement and conspiracy, they were subject to criminal prosecution or to an equity suit *by the government*

14. Even though the activity of private parties would otherwise be illegal as in violation of the antitrust laws, they may not be held liable for bringing matters before the governmental official or body, state or federal, having jurisdiction or for action taken by those governmental authorities within the scope of their legal powers. *Washington Brewers Institute v. United States*, 137 F. 2d 964 (9 Cir.).

under the Sherman Act, even though the rates had been approved by the Commission, but a private plaintiff could recover no damages because the approval of the rates by the Commission conclusively established that he had paid rates no higher than he had a legal right to pay. As the court said:

"Section 7 of the Anti-Trust Act gives a right of action to one who has been 'injured in his business or property.' *Injury implies violation of a legal right.*"

And see *Maltz v. Sax, et al.*, 134 F.2d 2 (7 Cir.), cer. den. 319 U.S. 772, where a plaintiff was held to have no cause of action for damages from a conspiracy under the antitrust laws which injured him in his business of the manufacture and sale of punchboards, because punchboards are a gambling device and therefore against public policy, and therefore he had been damaged in no legal right.

In the present case, denial by the Department of the Interior of plaintiff's application for a lease was conclusive that the plaintiff had no legal right to a lease. It would be rank conjecture to speculate that had the defendants not attempted to obtain a patent on the Little Placer, the plaintiff would have been successful in obtaining a lease. And the Department has itself stated just that. There are in evidence here (R. 819) certified copies of (1) a decision of the Department of the Interior dated January 22, 1947,¹⁵ denying the plaintiff's renewed application for a lease, (2) order of the Department dated February 24, 1947, denying the plaintiff's motion for a rehearing. The first document states that plaintiff's application for a prospecting permit was finally rejected November 23, 1928; that plaintiff did not appeal from that rejection, and that "the Commissioner * * * *finally rejected* the application for a lease on May 3, 1933, and *closed the case.*" It then recites the proceedings between the United States Borax Company and the Land Office, to which plaintiff here "was not a party and did not participate". It

15. The transcript erroneously describes this as July 22, 1927.

states that after the United States Borax Company relinquished all claims to the Little Placer in 1945 the Burnham company pressed an application for reinstatement of its lease application. After noting the contention of the Burnham company

"that it should be granted a lease as a matter of equity because a foreign borax combine was working against it from 1928 on" and "that the combine could have colored the picture as to the Little Placer during the first hearing"

it states that Burnham did not and could not contend that it was entitled to a lease as a matter of law, and it continues:

"Appellant's claim therefore comes down to the contention that it should be granted reinstatement and a lease because of equitable considerations. On this score, appellant avers that it would have been granted a lease without competitive bidding in 1933 had the Department not rendered an erroneous decision. *This is pure conjecture.*

* * * * *

"As for the reference to the borax combine and the suggestion that it prevented appellant from successfully establishing its case in 1933, this is also so speculative and conjectural that it cannot be given appreciable weight."

It is clear that the Little Placer allegations can in no way serve to rescue plaintiff's case from the statute of limitations.

II.

The Running of the Statute of Limitations Was Not Told by "Lack of Knowledge" by Plaintiff of Its Cause of Action or by Any "Fraudulent Concealment."

A. "LACK OF KNOWLEDGE" DOES NOT TOLL THE STATUTE OF LIMITATIONS IN A TREBLE DAMAGE SUIT, AT LEAST IN THE ABSENCE OF "FRAUDULENT CONCEALMENT."

Fundamentally, and in the absence of some exception, statutes of limitations begin to run from the moment a cause of action

arises, whether the wronged party knew that he had a cause of action or not, and even if he did not know the identity of the wrongdoer. *Rose v. Dunk-Harbison Co.*, 7 C. A. 2d 502; *Lattin v. Gillette*, 95 Cal. 317; *Scafidi v. Western Loan & Bldg. Co.*, 72 C.A.2d 550, 556 (hearing by S. Ct. denied); *Neff v. New York Life Ins. Co.* 30 Cal. 2d (30 A. C. 161, 167, citing *Scafidi* case).

This Court announced the same rule in a treble damage suit under the antitrust laws: "Mere ignorance of the injury complained of, or of the facts constituting such injury, will not prevent the running of the statute." *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F.2d 742 at 752 (9 Cir.).

There is a statutory exception in the case of actions for "relief on the ground of fraud"; there the statute does not begin to run until discovery (California C.C.P., Section 338, Subd. 4). But a suit under the Sherman Act is not such an action. In *Foster & Kleiser Co. v. Special Site Sign Co.*, supra, this Court rejected the contention that it was. It held that C.C.P. Sec. 338, subd. 4, applies only when fraud is the gravamen of the action, and that such is not the case in a Sherman Act suit.¹⁶

Again, in *State of Oklahoma v. American Book Company*, 144 F.2d 585, also a treble damage suit under the Sherman Act, in which the action was held barred by limitations, the Circuit Court of Appeals for the Tenth Circuit cited *Foster & Kleiser*, supra, and declared that

"The running of the statute was not tolled by the non-discovery of the claim. The claim was not one for fraud

16. It is worthy of note that in 1933 the California legislature amended C.C.P. Sec. 338, subd. 4, by extending the rule applicable to "an action for relief on the ground of fraud or mistake" to actions for relief on the ground of conspiracy, thus providing that the statute should not run until discovery of the facts constituting the conspiracy. But the very next session of the legislature in 1935 deleted the reference to conspiracy, a clear exposition that conspiracy is not fraud within the meaning of the statute.

within the meaning of [the Oklahoma statute of limitations identical with C.C.P. Section 338, subd. 4]."

Plaintiff also relies on a non-statutory exception that the running of the statute may be tolled in some cases if there has been "fraudulent concealment" by the wrongdoer. In *Cummings v. Board of Education*, 190 Okl. 533, 125 Pac. 2d 989 at 993, the court held that the doctrine of fraudulent concealment may not be extended to an action for damages created by statute which, though remedial as to the plaintiff, is penal as to the defendant. This case was cited with approval by the Tenth Circuit in *State of Oklahoma v. American Book Company*, supra, where fraudulent concealment was alleged in an amended complaint.

If, however, the doctrine of "fraudulent concealment" may be applied in a proper case to a damage suit under the anti-trust laws, this is not such a case. We contend:

- (1) That no facts constituting fraudulent concealment were alleged in the complaint; and
- (2) That the evidence conclusively demonstrated that there was no "fraudulent concealment."

B. THE COMPLAINT DOES NOT ALLEGE ANY FACTS CONSTITUTING FRAUDULENT CONCEALMENT BUT ON THE CONTRARY NEGATIVES ITS EXISTENCE.

Violation of the anti-trust law is, of course, not itself fraudulent concealment. *State of Oklahoma v. American Book Company*, supra; *Foster & Kleiser v. Special Site Sign Co.*, supra.

The cases on "fraudulent concealment" all emphasize the existence of fiduciary and confidential relationships (e.g., *Neff v. New York Life Ins. Co.*, 30 Cal. 2d (30 A. C. 161, 169)),¹⁷ and it is a rare case where the statute has been held

17. *Pashley v. Pacific Electric Ry. Co.*, 25 Cal. 2d 226, emphasizes (at 233 and 235) the existence of a confidential and fiduciary relationship arising from the fact that defendants' agent and the plaintiff occupied the relationship of physician and patient.

to be tolled on the doctrine of fraudulent concealment in the absence of such a relationship.

In the present case there was no fiduciary relationship between the plaintiff and defendants. Indeed, if reference be made to the evidence, it will be seen that for years plaintiff had distrusted defendants, believed them to be dishonest, was engaged in litigation with one of them and was threatening litigation against all of them (see, e.g., pages 9-11, 22-23, 26-28, 33-35, 37-43, supra).

Consequently, "Mere silence on the part of the [defendants] would not constitute, under well settled principles, a fraudulent concealment." *Kimball v. Pacific Gas & Electric Company*, 220 Cal. 203, 217; *Foster & Kleiser Co. v. Special Site Sign Co.*, supra.

As said in the case of *Daily Telegraph Company v. Long Beach Press Publishing Co.*, 133 Cal. App. 140 (hearing by Supreme Court denied), where an appellant whose complaint had been dismissed on demurrer sought to excuse failure to make earlier discovery by alleging that the "defendant kept secret and concealed the true facts":

"It is the well-established rule, however, that *in the absence of an allegation of affirmative acts in the nature of artifice to conceal the facts, a complaint is deficient in this respect.* The rule has been expressed in the case of *Phelps v. Grady*, 168 Cal. 73, at page 78 [41 Pac. 926, 928], by quoting from *Wood v. Carpenter*, 101 U. S. 135 [25 L. Ed. 807], as follows: '* * * Concealment must be the result of positive acts. Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry.'"

Kimball v. Pacific Gas & Elec. Co., 220 Cal. 203, involved a fiduciary relationship under the Workmen's Compensation Act. Thereunder the employer is entitled to recover from a third party for the employee's damage, the recovery in excess of amounts expended by the employer are held by it for the employee, and the employer may not settle without the employee's consent. In spite of this relationship the employer negotiated a settlement and concealed from the employee the fact that a third party was responsible (cf. p. 217).

The other cases cited by plaintiff all involve conventional fiduciary relationships.

To the same effect, *Scafidi v. Western Loan & Bldg. Co.*, 72 C. A. 2d 550, 562, 563.

**The Burden Is on a Plaintiff to Plead and Prove a Valid Excuse for Delay
in Suit; Facts, Not Conclusions, Must Be Alleged**

Where an action is brought more than the statutory period after the cause of action arose, the plaintiff has the burden of pleading and proving a legal and valid excuse for its delay. The burden of pleading and proving fraudulent concealment is on the party who claims fraudulent concealment. *Strout v. United Shoe Machinery Co.*, 208 Fed. 646 (an antitrust case, cited by this Court in the *Foster & Kleiser* case); *Kimball v. Pacific Gas & Electric Co.*, 220 Cal. 203, 215; *Pashley v. Pacific Electric Railway Co.*, 25 Cal. 2d 226, 230. This burden is quite rigorous and requires a plaintiff to plead facts, not conclusions,¹⁸ and the allegations "must be construed most strongly against the pleader." *Prentiss v. McWhirter*, 63 F.2d 712 (9 Cir.). The principles need not here be elaborated, because it is clear, both from the complaint and from the evidence offered by plaintiff,¹⁹ what plaintiff's excuse was, and it is equally clear that it was not good in law.

**Denial of a Claim or of an Accusation of Wrongdoing
Is Not Fraudulent Concealment**

The only factual allegations relative to fraudulent concealment are in paragraph 75 of the complaint (R. 46). It is there

18. *Vertex Investment Co. v. Schwabacher*, 57 C.A.2d 406 (Hearing by Supreme Court denied); *Lady Washington Consolidated Co. v. Wood*, 113 Cal. 482; *Wood v. Carpenter*, 101 U.S. 135 at 140; *Collins v. The Texas Company*, 123 Cal. App. 60; *Consolidated R. & P. Co. v. Scarborough*, 216 Cal. 698; *Daily Telegram Co. v. Long Beach Press Publishing Co.*, 133 Cal. App. 140; *Turman v. Holmes*, 29 C.A.2d 198; *Haley v. Santa Fe Land Improvement Company*, 5 C.A.2d 415 (judgment reversed with instructions to sustain demurrer); *Moore v. Boyd*, 74 Cal. 167; *Johnson v. Ebrgott*, 1 Cal. 2d 136; *Myers v. Metropolitan Trust Company*, 22 C.A.2d 284; *Shonts v. Hirleman*, 28 F. Supp. 478 (S. D. Cal.).

19. In *Neff v. New York Life Ins. Co.*, 30 A.C. 161, the action was dismissed on plaintiff's offer of proof.

alleged that in May 1929 George Burnham called on C. B. Zabriskie, manager of the defendant PCB, and

"protested against the said cuts made by defendants in the price of borax and charged said defendants with so doing for the purpose of eliminating, and with the intent so to do, plaintiff from its operations at Searles Lake and from any competition with the products of defendants"

and that Zabriskie denied the accusation.

Thus in 1929, sixteen years before the suit was instituted, the plaintiff accused one of the defendants of having conspired to cut the price of borax for the purpose of eliminating the plaintiff. This very fact, demonstrating plaintiff's belief and state of mind 16 years ago, is enough to show that the action is barred by limitations.

The excuse for not suing amounts to nothing more than this: the plaintiff went to one of the parties whom it believed had wronged it, accused him of so doing, and the accused wrongdoer denied the accusation. Such an excuse is wholly inadequate; the fact alleged does not constitute fraudulent concealment.

A leading authority on the subject is a decision of this Court, *Feak v. Marion Steam Shovel Co.*, 84 F.2d 670 (9 Cir.), *cert. den.* 299 U.S. 604, which establishes that denial of an accusation of wrongdoing is not fraudulent concealment. This Court there said:

"Restatements of the fraudulent representation do not of themselves constitute concealment, and *where a party is once put upon notice of fraud he cannot avoid the consequences of his constructive knowledge of the fraud nor fulfill his duty to investigate by going to the party he suspects of the fraud. He cannot desist from further investigation because he is reassured of the truth of the original representations.*"

To the same effect, that after a person suspects that a wrong has been perpetrated on him, he cannot stop the running of the

statute by going to the alleged wrongdoer and obtaining assurance that no wrong was committed, see

Turman v. Holmes, 29 C.A.2d 198;

Burchmore v. H. M. Byllesby & Co., 1 N.W.2d 327 (Neb. 1941);

Phillips v. Baker, 114 S.W.2d 421 (Tex. 1938) (citing the *Feak* case);

34 *Am. Jur.* 137, which states:

"In purely business transactions, it seems to be the rule that the reaffirmance of the truth of the original statements, after notice that such statements were fraudulent, does not constitute a concealment of the fraud and so excuse delay in bringing action."

In *Neff v. New York Life Ins. Company*, 30 Cal. 2d (30 A.C. 161), plaintiff appealed from a judgment dismissing an action on a disability policy because of the statute of limitations. Plaintiff claimed that the statute had been tolled by fraudulent concealment, alleging that defendant had fraudulently told the insured that he was not entitled to any benefits and that he was not permanently, continuously and wholly prevented from pursuing a gainful occupation. The Supreme Court, noting that statutes of limitations rest on sound policy and are among the most beneficent to be found in the books, said that "no mere denial of liability, even though it be alleged to have been made through fraud or mistake, should be held sufficient, without more, to deprive the insurer of its privilege of having the disputed liability litigated within the period prescribed by the statute of limitations" (p. 168). It pointed out that if the defendant's acts were to be held to constitute fraudulent concealment, no one could deny liability without indefinitely suspending the running of the statute of limitations.

As said in *Jackson v. Buchanan*, 59 Ind. 390:

"To deny a fact, or procure another to deny it, is not a positive or an affirmative act; it is a negation. That the guilty parties should deny the act averred in the complaint,

is not calculated to conceal the fact, but rather to awaken the attention of the aggrieved party to its existence, and put him upon enquiry as to its truth; nor does it tend to avoid enquiry concerning it, but rather to invite it. To hold that the denial of a fact is such a concealment of it as would prevent the statute of limitations from running, would require all persons to admit facts, or remain silent when confronted with them, or place themselves beyond the protection of the statute."

C. THE EVIDENCE CONCLUSIVELY ESTABLISHED THAT THERE WAS NO FRAUDULENT CONCEALMENT.

1. The Special Issue Framed by the Court Below Selected for Consideration a Crucial Element in the Claim of Fraudulent Concealment, Without Which the Claim Necessarily Failed.

The plaintiff (Brief, pp. 15, et seq.) criticizes the wording of the special issue because it did not refer to "diligence" or "discovery". Since a directed verdict was granted, the wording is not of vital importance, but it serves to illustrate plaintiff's misunderstanding of the case.

Since the cause of action here is not one based on fraud, mere lack of knowledge or of "discovery" could not toll the statute. Unless there was a "fraudulent concealment", the statute would have run although plaintiff were wholly ignorant that it had a cause of action or had been "diligent" in investigating (Cf. *Scafidi v. Western Loan & Bldg. Co.*, 72 C.A.2d 550).

Now, one of the principal elements of "fraudulent concealment" is *reliance* by plaintiff on some affirmative artifice or contrivance to prevent discovery, a reliance as result of which plaintiff was lulled into inaction. In other words, the doctrine of fraudulent concealment rests on estoppel. As said in *Neff v. New York Life Insurance Company*, 30 Cal. 2d..... (30 A.C. 161, 170), the plaintiff must plead and prove "facts which would estop the defendants from asserting such defense", i.e., the defense of the statute of limitations. To the same effect is *Pashley v. Pacific Electric Railway Co.*, 25 Cal. 2d 226 at 231,

para. 3a, (relied on by plaintiff), which shows the controlling effect in a fraudulent concealment case (as distinguished from a case where the cause of action is based on fraud) of a plaintiff's *belief*. An estoppel requires *reliance* and a reliance requires *belief* (e.g., 3 *Pomeroy's Equity Jurisprudence*, 5th ed., Sec. 812, p. 230, Sec. 890, p. 502).

In short, if after the alleged Zabriskie conversation—the only alleged act of fraudulent concealment—plaintiff still believed, or subsequently again believed at any time up to the statutory period before suit was brought, that it had been damaged by acts of defendants in violation of the Sherman Act, it could not claim reliance on an alleged fraudulent concealment. That excuse goes by the board. Even could a denial be the basis of a “fraudulent concealment”, one who does not accept and continue to believe the denial may not protect himself from the penalties of delay by hiding behind it any more than in an action for fraud one may recover unless actual reliance is proved. *Spinks v. Clark*, 147 Cal. 439, 444; *Smith v. Brown*, 59 C.A.2d 836.

The issue as framed by the trial court was thus far more favorable to the plaintiff than the law warranted, for it inquired whether the plaintiff had knowledge or good cause to believe, whereas mere belief would have been sufficient. The special issue was precisely the sort of thing encouraged by *R.C.P.* Rule 49(a), for it acutely singled out from a mass of facts a simple question, an affirmative answer to which would necessarily require a decision that the plaintiff was barred by limitations and thus end the case without wasting the time of the court and the litigants.

2. The Evidence Was Conclusive and Overwhelming.

The evidence emanates from the plaintiff itself, consisting—in its entirety—of statements of plaintiff. Moreover, it is all what may be called “real” evidence (Cf. I *Wigmore on Evidence*, 3d Ed., p. 396, Sec. 24), which, from the very nature of things, may not be contradicted or denied. That is to say, it does not consist of testimony, oral or written, by third parties as to

what plaintiff knew or did. It includes acts of plaintiff and written statements analogous to "verbal acts" (Cf. VI *Wigmore on Evidence*, p. 190, Sec. 1772) which are not merely evidence of plaintiff's past knowledge or state of mind but immutably constitute that knowledge or state of mind just as the mass of a mountain stands immune from any denial of its existence, the denial of which must necessarily be treated as "sham" and disregarded.²⁰

It is for this reason that the trial court was well within its right and duty in directing a verdict on the special issue of fact. *Brady v. Southern Railway Co.*, 320 U.S. 476. There the court said (p. 479):

"When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by nonsuit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial, the result is saved from the mischance of speculation over legally unfounded claims."

And see *Farr v. Union Pacific Railway Co.*, 106 F.2d 437 (10 Cir.).

The evidence reviewed at pages 9 to 50, *supra*, demonstrates that plaintiff at all times continued to believe that the defendants had caused it damage by acts in violation of the antitrust laws and that despite Burnham's alleged conversations of May 17, 1929, plaintiff remained convinced that it had a good case against the defendants. So it wrote to Thurman Arnold in 1939. The plaintiff had previously been warned by its attorney Townsend that innocent explanations of the price cuts were merely "cloaks and disguises". In its letters to the Department of Justice in 1939 and January 1940, in which it only repeated what it

20. And cf. the rule that written admissions or statements made before any controversy has arisen so far outweigh oral assertions from the witness stand to the contrary that the latter will not be treated as even raising a conflict. *In re Irvine*, 102 Cal. 606.

had been telling Senator Pittman and others throughout the entire previous decade, plaintiff itself disposed of these explanations as wholly inadequate for reasons expressed and stated as being wholly conclusive to it.

Without attempting to review all the facts that demolish plaintiff's claim of fraudulent concealment, we may note:

1. While plaintiff believed that Stephen Mather was responsible for procuring the fraud order as a tool of the defendants and to injure plaintiff, Burnham did not mention Mather or the post office fraud order to Zabriskie, and nothing was said by Zabriskie with respect to it, although at that very conversation the plaintiff's conviction on the subject was further inflamed by seeing Mather's picture on the wall, and thereafter plaintiff continued in its previous views about defendants' responsibility for the fraud order.

2. A few months after the Zabriskie conversation and in January 1930 plaintiff, in order to induce the U.S. District Court for Nevada to grant it relief, reaffirmed and amplified under oath all the accusations which it had previously made against the defendants of violation of the antitrust laws.

3. In the middle 30's plaintiff was further aroused by what it believed to be the monopolistic activities of the defendants and was warned and believed that defendants were dishonest and not to be trusted.

4. Plaintiff repeatedly accused defendants to one person or another, including attorneys consulted by him, of having committed damage to it by acts in violation of the antitrust laws, all as later charged in the complaint filed herein in 1945.

Plaintiff's brief (p. 25) seeks to put the best face possible on the facts by saying "admittedly", the evidence shows "that from time to time from 1929 Burnham became doubtful of the truth of Zabriskie's and Emlaw's assurances that their companies were not violating the law." This concession, however mild it may be, is alone sufficient to sustain the judgment. Indeed on page 22 its brief argues:

"Furthermore, actual knowledge by a wronged party that the acts of defendants as charged in a complaint were in themselves performed and carried out in violation of the Anti-Trust laws does not constitute proof of a conspiracy formed *after* the occurrence of such acts and on which conspiracy the action is solely based." [Emphasis is plaintiff's]

This concedes that it always knew that the acts which caused its damage were in violation of the antitrust laws, but plaintiff seeks to escape the statute of limitations on the ground that it did not know of a later conspiracy formed after those acts were committed and for which it has no right to recover since no acts were done thereunder to its damage!

3. Plaintiff's Real Reasons for Not Suing Are No Excuse in Law.

(a) Lack of Funds.

Plaintiff's real reason for not suing was, as it wrote to Thurman Arnold, its lack of funds (see p. 49, *supra*). But lack of funds with which to sue is no excuse for delay. This Court has so held in *Gillons v. Shell Oil Co. of California*, 86 F.2d 600, 606 (9 Cir.), and *Cummings v. Wilson & Willard Mfg. Co.*, 4 F.2d 453, 454, 455, *cer. den.* 268 U.S. 701, following *Leggett v. Standard Oil Company*, 149 U.S. 287, 294, and *Hayward v. National Bank*, 96 U.S. 611, 618. To the same effect, *Wolf Mineral Process Corporation v. Minerals Separation North American Corporation* (4 Cir.), 18 F.2d 483, 490, *cer. den.* 275 U.S. 558, and *De Estrada v. San Felipe Land & Water Co.*, 46 Fed. 280, 282 (D. C. Cal.).

(b) Lack of Conclusive Evidence.

Plaintiff also excuses its delay because it had not assembled in its possession conclusive evidence. But the law does not permit a man to defer bringing suit until he has the legal evidence to prove his case. If a party believes he has been wronged, he may not defer suit until he has his proof "sewed up." Cf. *Lattin v. Gillette*, 95 Cal. 317.

A plaintiff, being convinced or believing that he has a cause of action, must sue before the statute of limitations has run and then make use of the available discovery procedures, such as taking depositions to require adverse parties to answer under oath and produce documents, demanding inspection of documents, and the like. *Scafidi v. Western Loan & Building Company*, 72 C.A.2d 550, 570; *Fidelity & Casualty Co. of New York v. Jasper Furniture Co.*, 117 N.E. 258 (Ind.); *Texas Rice Lands Co. v. McFaddin etc. Co.*, 265 S.W. 988, 890 (Tex.).²¹

Plaintiff argues that one may defer suing when he is aware of facts which make him merely "suspicious," and cites decisions where fraud is the gravamen of the cause of action and where, by the statute itself, the statute of limitations does not begin to run until "discovery."²² In the California cases involving a claim of fraudulent concealment, the courts have repeatedly said that the plaintiff is under a duty to act when he is aware of facts that make him "suspicious." *Scafidi v. Western Loan & Bldg. Co.*, 72 Cal. App. 550, 569; *Bliss v. Martin*, 74 C.A.2d 500, 507 (hearing by S. Ct. denied); *Hobart v. Hobart Estate Co.*, 26 Cal. 2d 412, 438. But the matter re-

21. Compare the observation in *Bowles v. Pure Oil Company*, 5 F.R.D. 300:

"* * * it cannot be contended that the law, in general, has ever been that a plaintiff's action must fail because, when he begins his suit, he does not know enough about his cause of action to establish it forthwith by competent evidence * * *. Under the old equity practice a bill of discovery could be maintained not only in aid of a pending suit but also where there was no suit in existence, but only one in contemplation. Under the Rules of Civil Procedure, Rule 27, before an action is instituted, upon a showing that the proposed plaintiff 'is presently unable to bring' the action, discovery by depositions may be had."

22. Plaintiff also cites *American Surety Company v. Pauly*, 170 U.S. 133, which does not involve the statute of limitations. That was a suit on a fidelity bond, which required notice to be given of any act which might involve loss as soon as it came to the insured's knowledge. The case turned purely on the construction of the contract which was to be construed most strongly against the party that had drafted it. "If the company intended the bank to inform it of mere rumors or suspicions, that intention should have been clearly stated in the contract."

quires no discussion, because this case is infinitely stronger than any mere matter of suspicion. It is a case of positive conviction.²³

Under *Strout v. United Shoe Machinery Co.*, 208 Fed. 646, a treble damage suit under the antitrust laws, cited by this Court in the *Foster & Kleiser* case, a great deal less knowledge than plaintiff had here was held to defeat a claim of fraudulent concealment. That was a suit by a trustee of a corporation "to recover damages * * * from a secret conspiracy by defendants in alleged violation of the anti-trust act." The acts complained of as having injured the corporation's business consisted of buying a majority of the stock of the corporation, electing officers or directors of the defendant to form the entire board of directors of the corporation, stopping the corporation's business, and enforcing disuse of its patents by exercising the control thus acquired. The court said that "the supposition that these doings might have been fraudulently concealed does not seem to me entitled to serious consideration." In reply plaintiff argued that, while it knew of the acts done, it did not know that they were done in conspiracy and with the improper purpose but for which the plaintiff would have no cause of action under the Sherman Act. The court replied:

"The plaintiff says that these acts were made unlawful by the purpose of the defendants, in combination, to do the above acts in restraint of trade, and that this purpose, if

23. Plaintiff cites *Hazel Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, but it has no relevance. In order to help it obtain a patent of doubtful validity, Hartford's officials wrote an article praising the device as a remarkable advance in the trade, had it signed by an apparently disinterested expert, and had it published in a trade journal as his article. It then submitted the article to the Patent Office in support of the patent application. In a later patent infringement suit against Hazel Atlas, Hartford's lawyer (who had taken part in the spurious publication) cited it to the Circuit Court of Appeals in his brief, and that court quoted from the article copiously in rendering a decision sustaining the patent. This was a "deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." The Supreme Court held that diligence of Hazel Atlas in uncovering this "sordid story" was not relevant because the matter did not concern only private parties; it was "a tampering with the administration of justice," a "wrong against public legal institutions, and involved the integrity of the judicial process."

not disclosed to the trustee, was fraudulently concealed. No doubt it may be assumed that such a purpose, apart from the acts done, would not be disclosed; but, except so far as its existence is established by the alleged acts done, I do not see how it could have afforded this plaintiff any cause of action. The demurrer is sustained * * *."

In the present case plaintiff admitted that it knew that it had sustained damages and knew that the defendants had caused that damage, and the only thing it even claims that it did not know was that the defendants had acted in conspiracy (Cf. Burnham affidavit, R. 125, lines 3-6). This excuse is identically that rejected in the *Strout* case.

4. Answer to Other Contentions of Appellant.

(a) Re Burden of Proof.

Plaintiff argues (Brief, p. 36) that the burden of proof on the special issue was on defendants, and that defendants offered no evidence. The gross error of the claim that we offered no evidence has already been noted (p. 7, *supra*). The question of burden of proof is of no importance since the evidence was overwhelming, and questions of burden are important only when evidence is evenly balanced. However, the law is clear that the burden of proof was on the plaintiff (see p. 69, *supra*), and *plaintiff assumed it voluntarily* (pp. 53-54, *supra*).

(b) Re Criticism of the Date in the Special Issue.

Plaintiff's brief (p. 22) criticizes the special issue because it refers to "knowledge" or "cause to believe" as of May 17, 1929. The plaintiff argues that it relies on a conspiracy formed "some six months after May 17, 1929" and asks how it could know or have cause to believe in May what had not yet happened.

This is an amazing argument. It was the plaintiff who imported into this case the date May 17, 1929 by contending that the statute of limitations was tolled by a "fraudulent concealment" worked on that date. This, it asserted in the trial court,

was its sole "excusatory fact" (see p. 54, *supra*). If, as plaintiff now claims, it sues only on a conspiracy formed after May 1929, nothing in that month could have been a fraudulent concealment of a cause of action that had not yet arisen. There being no claim of any act of fraudulent concealment after the alleged conspiracy was formed, there could be nothing to toll the statute and the action would have clearly been barred long ago.

(c) Re Claim That Evidence of Concealment Was Rejected.

Plaintiff's brief (at p. 28) contains a topic heading, "Evidence of Concealment was Admissible," but no evidence of this character is identified in the subsequent discussion as having been rejected, and in the Specification of Errors (Brief, pp. 11-13) no error in exclusion of evidence is stated.

Elsewhere in its brief (pp. 25, 26) plaintiff refers to certain letters which the trial court rejected. These letters, purportedly written by an employee of PCB to one Gauge in 1935 and 1937, had not the faintest connection with plaintiff. Gauge had a contract with PCB to buy borates for resale in the Orient (R. 436). Two of the letters, referring to the Japanese trade, contained a request that they be destroyed. In rejecting the offer the trial court said (R. 440):

"the issue in this case is whether or not, as you have alleged it, there is any unlawful concealment as to the cause of action of this plaintiff, and that entails transactions between the plaintiff and the defendants and not between third parties and the defendants."

A destruction of records or any act of that character which did not come to the plaintiff's attention and did not interfere with any inquiry or investigation on its part is obviously irrelevant. Nothing in records which it never saw or asked to see could have misled it or could possibly be called a trick or contrivance intended to exclude suspicion. *Vertex Investment Co. v. Schwabacher*, 57 C.A.2d 406, 413, 416.

Moreover, the Gauge letters were written more than six years

after plaintiff's alleged cause of action had accrued, and plaintiff was already barred by the statute of limitations. Acts occurring after the statute of limitations has begun or has run are irrelevant, whether they are "concealment" or "fraudulent" or not. *Vertex Investment Company v. Schwabacher*, 57 C.A.2d 406, 420; *Del Campo v. Camarillo*, 154 Cal. 647; *Scafidi v. Western Loan & Building Co.*, 72 C.A.2d 550 at p. 561.

(d) Re Refusal of Court to Permit Plaintiff

to Read Complaint to the Jury. •

Plaintiff's contention (Brief, p. 30) that it was error for the court to refuse to permit the *whole* complaint to be read to the jury is footless, since the case was taken from the jury. Moreover, the court's ruling was correct; plaintiff's purpose in wanting to read the discursive complaint (52 pages when printed) was to inflame the jury so as to prevent it from giving fair consideration to the only issue that was to be submitted to it. The court had given to the jury an adequate explanation of the case, sufficient for their understanding of that restricted issue (cf. R. 321-324).

If a general answer had been filed, whatever was not denied would have been deemed admitted, but by permission of the court the defendants' answers were special and were confined to the allegations pertinent to the statute of limitations. Therefore they did not admit any allegations on the merits.

The trial court had expressed its attitude at the pre-trial conference, thus:

"The jury should not be concerned in this case with whether the defendants violated the Antitrust Law, whether they are good people or bad people, nor should the jury be concerned with who the plaintiff is, whether he is a good man or a bad man, whether he conducted himself properly or whether he had bouts with the law, or not." (R. 264)

So faithful to this view was the court that it even excluded the Post Office fraud order when offered by defendants (see R. 405, 406, Def. Ex. C for Identification).

CONCLUSION

If ever an action was barred by the statute of limitations, this, we submit, is it. We respectfully submit that the judgment is correct and should be affirmed.

Dated: San Francisco, California, April 26, 1948.

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No. 11,766

United States
Circuit Court of Appeals

For the Ninth Circuit

BURNHAM CHEMICAL COMPANY, a corporation,
tion,

Appellant,

vs.

BORAX CONSOLIDATED, LTD., a corporation,
PACIFIC COAST BORAX COMPANY, a corporation,
UNITED STATES BORAX COMPANY, a corporation, and AMERICAN
POTASH & CHEMICAL CORPORATION, a corporation,

Appellees.

Reply Brief of Appellant to Brief on Behalf of
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POTASH & CHEMICAL CORPORATION, a corporation,

Appellees.

**Reply Brief of Appellant to Brief on Behalf of
Appellee American Potash & Chemical
Corporation**

This particular appellee has filed a separate brief in reply to the opening of appellant, but inasmuch as various questions discussed in the brief of such appellee are also referred to and discussed in the brief of the British defendants and replied to in appellant's reply (referred to

herein as "Other Brief" or "O.B."), we hereby incorporate such reply to that of the British appellees as a part of this reply to the brief of American Potash & Chemical Corporation. We shall serve counsel for the latter appellee with copies of our reply to the brief of the British appellees so that they may be fully informed of the contents thereof.

In this reply we shall follow as closely as possible the sequence of the points raised by such appellee.

I.

AS TO THE CLAIM THAT A CIVIL ACTION FOR TREBLE DAMAGES UNDER THE ANTI-TRUST LAWS IS NOT BASED ON A CONSPIRACY.

A quick and concise reply is: The cause of action is the conspiracy. See authorities such as *Nash v. United States*, referred to in Point I of appellant's reply (O.B.) to the brief of the British appellees and the discussion therein of such point. We do not question the statement that a mere conspiracy, while constituting a cause of action, does not in itself permit a plaintiff to recover damages; there must be overt acts growing out of the conspiracy, from which overt acts plaintiff has suffered damages. The "cause of action" and the "right to recover" are separate and distinct, and there can be no actual recovery in money damages unless they both exist and in a treble damage action, such as the present, each depends on the other.

As said in *Northern Kentucky Telephone Co. v. Southern Bell Telephone, Etc.*, 73 F.(2), 333 (C.C.A. 6) (Cert. den. 55 S.C. 546), at page 334:

“The distinction urged between an action for a conspiracy and one for damages growing out of a conspiracy would seem to be a mere play upon words.”

That was a civil treble damage action. We have fully discussed the *Foster & Kleiser* case in the “O.B.” and respectfully refer to such discussion in reply to all that counsel say in their brief as to such citation.

II.

AS TO THE CLAIM THAT “A CONSPIRACY IN VIOLATION OF THE ANTI-TRUST LAW DOES NOT GIVE RISE TO EITHER A SUIT IN EQUITY OR AN ACTION BASED ON FRAUD.

We do not contend that a straight action at law for treble damages cannot be brought and maintained when within the period of the statute of limitations, or that every treble damage action is either a suit in equity or an action based on fraud. We do contend that in treble damage cases, as in various other classes of action, where fraud raises its ugly head, the doctrine of estoppel will hurry to the assistance of the wronged party and see that justice is done; estoppel, being an arm of equity, will move the whole case over to the equity side of the Court and do complete justice between the parties.

The late case of

United States v. Paramount Pictures, 68 S.Ct. 915,

illustrates such point. That was a suit by the Government to restrain violations of the Anti-trust Act and in discussing a certain order of the District Court, the Supreme Court stated in reference thereto (p. 925):

“* * * For equity has the power to uproot all parts of an illegal scheme—the valid as well as the invalid

—in order to rid the trade or commerce of all taint of the conspiracy. *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 724, 64 S.Ct. 805, 814, 88 L.Ed. 1024.”

There is no reason why the equitable rule applied in *Holmberg v. Armbrecht* should not be applicable to treble damage actions. That the *Holmberg* case was on the equitable side of the Court was not because it was an action to recover the double liability of bank stock holders, but because of the *concealment* by Bache of his ownership of the stock in question.

On p. 397 of the Official Report of the *Holmberg* case (327 U.S. 392) the Court stated:

“* * * If the Federal Farm Loan Act had an explicit statute of limitation for bringing suit under Sec. 16, the time would not have begun to run until after petitioners had discovered, or had failed in reasonable diligence to discover, *the alleged deception by Bache which is the basis of this suit.*” (Citing cases) (Italics ours)

The *Holmberg* case is not the only authority of our highest Court that holds State statutes of limitation are not applicable in Federal equity cases; the authorities cited in the *Holmberg* case are conclusive on this point.

Counsel cite the case of *Chattanooga Foundry etc. v. Atlanta*, but there was no fraud in that case, hence no reason for the equitable doctrine of estoppel to be applied.

There is no reason whatsoever why the rule of *Sears v. Rule*, cited in Subdivision II of the “O.B.” (reported 27 Cal. 2d, 131) should not be applied to treble damage actions. There it is stated:

“Nevertheless, if the defendant, after committing the wrongful act, has fraudulently concealed the facts from the plaintiff, who by reason of such concealment did not discover that he had a right of action until too late to sue, the defendant will be estopped from taking advantage of his own wrong by asserting the statute of limitations.” (Citing authorities)

Such is substantially the rule laid down in the *Holmberg* case. Natural justice and fair play should, and do, prevent a wrongdoer from raising the statute of limitations to cover and defend him from his iniquities. More and more courts of equity are applying their principles to relieve litigants from the harshness of purely legal principles.

We respectfully submit that no case could more strongly call for the application of the doctrine of estoppel than that presented here. Deceit, fraud and ruthlessness have destroyed appellant financially and to allow appellees to escape under the cloak of the statute of limitations would be a mockery of justice.

III.

AS TO THE CLAIM THAT THE THREE-YEAR STATUTE OF LIMITATIONS, SEC. 338, SUBD. 1, C.C.P. IS APPLICABLE.

Such claim is correct when restricted to actions at law for treble damages, but like the rule in the Federal Courts, evidence by the decision in the *Holmberg* case, where fraud and concealment exist to the extent of delaying the action until after the expiration of the statute, the statute is tolled until the discovery of the cause of action or until

such cause could have been discovered by the exercise of reasonable diligence (C.C.P. Sec. 338, subd. 4).

All authorities cited by counsel on p. 10 in support of their claim were straight actions at law for treble damages, and did not involve any of the equitable principles herein presented.

IV.

AS TO THE CLAIM THAT THE CAUSE OF ACTION PRESENTED HEREIN ACCRUED MORE THAN THREE YEARS BEFORE THE COMMENCEMENT OF THE ACTION AND WAS THEREFORE BARRED BY THE STATUTE.

Again counsel refer to the *Foster & Kleiser* case; that developed into a straight action at law for treble damages—hence the application of the three-year statute. As we have shown in our “O.B.” all else appearing in the *Foster & Kleiser* opinion is pure dicta and not applicable herein.

In this subdivision counsel refer (p. 13) to the Little Placer Claim and to the fact that no damages could have resulted to appellant by the refusal of the Government to grant appellant a lease thereof. The reference to the Little Placer was to an overt act and did not constitute a cause of action for damages for the interference by appellees with appellant’s application. This is an illustration of the error of the claims of appellees and the acquiescence therein by the lower Court, in considering each of such overt acts as a cause of action. Counsel allege that no damages are claimed re the Little Placer, but we submit that the allegation of the complaint for general damages is sufficient (Tr. p. 53, Par. 81). Par. 81 contains the allegation that appellant has been damaged, in a designated amount, resulting from all of the acts done and

performed by appellees and charged in the complaint. Such allegation is sufficient for this proceeding. In

National Etc. v. Kelling, 61 F.Supp. 76; and
Rivoli v. Loew's Etc., 7 F.R.D. 219,

it was held that general statements as to damages are sufficient in actions of this character.

On p. 14 counsel claim that Mr. Burnham, when he became suspicious, might have commenced an action for treble damages based on such suspicion, *and employed a bill of discovery to secure his evidence*. Such statement falls of its own weight, for in the first place, how could a complaint for treble damages be filed until the prospective plaintiff had actual knowledge of the cause of action, i.e., formation of the conspiracy, and secondly, can it be imagined for a moment that, even through the use of a bill of discovery or by deposition, the defendants so charged in such a situation would admit their wrongdoing? We strongly suspect that we would find the defendants withdrawing behind their constitutional immunity, inasmuch as if they admitted that they were guilty of such a conspiracy they would be subjecting themselves to a criminal prosecution under Secs. 1 and 2 of the Anti-trust Act.

On p. 14 counsel also attempt to pass over the claim of the existence of a continuing conspiracy as urged in the "O.B." What we have had to say in reply to a like contention is set forth in Subd. VIII of the "O.B." and to which we refer.

V.

AS TO THE CLAIM THAT SEC. 338, SUBD. 4, C.C.P. IS NOT APPLICABLE.

We have discussed one phase of this in the preceding portion of this brief. However, counsel again refer to the *Foster & Kleiser* case and state that this Court in such opinion held that such statute was not applicable to a treble damage suit. Such statement goes far beyond the real holding of the opinion in the cited case and overlooks the fact that what was said in this connection was mere dicta on the part of the Court.

VI.

AS TO THE CLAIM THAT THE DISTRICT COURT CORRECTLY HELD THAT THE PLAINTIFF FAILED TO PROVE THE CHARGE OF FRAUDULENT CONCEALMENT.

Under this heading are three subdivision. We shall reply to each separately.

1. As to the claim that appellees owed no duty to appellant to disclose to it the existence of the alleged conspiracy: Such claim is here immaterial in view of the fact that such conspiracy is admitted for the purposes of this motion, by the failure of appellees to deny such allegations. It is true that there may have been no absolute duty on the part of appellees to disclose to the appellant that they were guilty violators of the anti-trust laws, but that does not overcome the rule laid down in *Kimball v. P. G. & E.* and in *Pashley v. Pacific Electric Etc.*, cited on p. 16 of counsel's brief, that if parties are charged with such malefactions by the injured person and elect to

answer, they must, in making such answer, tell the truth; once electing to speak they must admit their wrongdoing, and their failure to do so constitutes fraud and concealment.

Here, aside from the first conversation with Mr. Zabris-
 kie and Mr. Emlaw in 1929, the record shows that on
 October 19, 1937, in a conversation between Mr. Burnham
 and the same Mr. Emlaw and a Mr. Baker, both con-
 nected with appellees, Messrs. Emlaw and Baker denied
 that there was any connection or fraudulent action on the
 part of the American Potash & Chemical Corporation and
 the Pacific Coast Borax Company; this at a time when
 both companies were most active in their attempts to
 destroy appellant financially (Tr. p. 148. Also please
 see Mr. Burnham's affidavit, Tr. p. 121, particularly at
 p. 132). In addition, at Los Angeles, Mr. Colby, an at-
 torney representing certain of appellees in a proceeding
 involving appellant, denied, when charged with anti-trust
 activities, that such existed.

Counsel claim that duty to disclose arises only if there
 is a confidential relationship between the parties. That,
 however, is not the rule, as an examination of the author-
 ities cited on pp. 16 and 17 of counsel's brief will dis-
 close. There were no confidential relations in *Kimball v.*
P. G. & E., supra, which finally settled the rule. Likewise,
 there were none in *Hanson v. Bear Film Co.*, cited p. 16.

2. As to the claim that appellant failed to properly
 allege fraudulent concealment: The allegations charging
 fraudulent concealment in the complaint are unanswered
 and therefore stand admitted, and the claim that "fraudu-

lent concealment must be of facts upon which the cause of action depends'' is answered by the fact that the complaint charges upon the 1929 conspiracy, the cause of action, and which allegations for the purposes of this proceeding are not denied and therefore remain admitted by this appellee. It is not true that the only fraudulent concealment was Mr. Zabriskie's denial. As shown in the preceding subdivision, the same applies to the statements of Emlaw and Baker made to Mr. Burnham on October 19, 1937. Furthermore, the allegations of the endeavors on the part of Mr. Burnham subsequent to November 1929 are shown in his affidavit appearing at Tr. pp. 133 to 156. Therein are alleged the various steps taken by Mr. Burnham to discover the reason for all that was happening to his company, and his inability to make the discovery of such 1929 conspiracy. No one could have been more active or could have put forth greater efforts to discover the truth of the situation; Mr. Burnham's affidavit discloses monumental efforts on his part to that end. All of the activities of all of the appellees reek with concealment of the conspiracy throughout the period referred to in the complaint.

3. As to the claim that "There was no error in the District Court's ruling directing a verdict for the defendants": Counsel cite the pre-trial order and in reply we refer to Subd. II of our "O.B." where this point is thoroughly discussed.

Also, the Court did usurp the functions of the jury and erred in taking the case from the jury. **All of the testimony upon which the lower Court rested such action on its**

part was based upon that introduced as to the various overt acts—not one word of such testimony referred to the cause of action upon which the complaint was based, viz. the 1929 conspiracy. Mr. Burnham testified explicitly that he had no knowledge or belief in the existence of the 1929 conspiracy until the disclosure thereof through the Government proceedings in 1944 (see “O.B.” Subd. II). Against this appellees introduced evidence surrounding the overt acts, not one bit of which evidence referred to the 1929 conspiracy. Therefore there was a direct contradiction between Mr. Burnham’s testimony and that offered by appellees.

We contend (a) that none of the testimony offered by appellees concerned the 1929 conspiracy in any respect; (b) such evidence showed Mr. Burnham’s constant endeavors to discover the true situation; and (c) that a real conflict existed between Mr. Burnham’s testimony that he knew nothing of the conspiracy charged upon until the Government cases appeared, and appellees’ testimony of such activities involving the overt acts. The real question presented was whether or not Mr. Burnham’s activities so testified to indicated any knowledge of the 1929 conspiracy. That was the only question that could properly go to the jury based upon the allegations of the complaint and the testimony.

In the light of the foregoing we respectfully submit that there is no basis for the contention made by counsel in the first paragraph on p. 24.

For the reasons stated herein, as well as in the Conclusion set forth in our "O.B." we respectfully submit that the judgment of the lower Court should be reversed and the case sent back for trial on the merits.

Respectfully submitted,

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No. 11,766

United States
Circuit Court of Appeals
For the Ninth Circuit

BURNHAM CHEMICAL COMPANY, a corporation,

Appellant,

vs.

BORAX CONSOLIDATED, LTD., a corporation,
PACIFIC COAST BORAX COMPANY, a corporation,
UNITED STATES BORAX COMPANY, a corporation, and
AMERICAN POTASH & CHEMICAL CORPORATION, a corporation,

Appellees.

Reply Brief of Appellant Burnham Chemical Company to Brief of Borax Consolidated, Ltd., Pacific Coast Borax Company and United States Borax Company.

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POTASH & CHEMICAL CORPORATION, a corporation,

Appellees.

Reply Brief of Appellant Burnham Chemical Company to Brief of Borax Consolidated, Ltd., Pacific Coast Borax Company and United States Borax Company.

Appellees' brief attempts to handle this appeal as though it was one from a judgment after a full trial on the merits, rather than an appeal from a judgment dismissing the case upon the ground of the statute of limitations pursuant to a motion therefor.

There were two motions made, one to dismiss on the ground of the statute of limitations, the other for summary judgment. The motion for summary judgment was denied (Tr. pp. 183, et seq.) and subsequently the case went to trial upon the special issue of the statute of limitations. The question to be presented to the jury was set forth in the pre-trial order (Tr. p. 195).

Appellees have ignored entirely the claim of appellant that "The Court erroneously usurped the function of the jury," a discussion of which commences on p. 23 of our opening brief, and reference to which is again made. We again contend that it was reversible error for the Court to withdraw the case from the jury.

I.

APPELLEES CANNOT INJECT NEW AND DIFFERENT CAUSES OF ACTION NOT SUED UPON.

Appellees answered only three paragraphs of the complaint, i.e., those charging concealment and fraud, set forth in the amendment to the complaint, paragraphs 81a and 81b (Tr. pp. 100 et seq.) and also paragraph 75 of the original complaint referring to the conversations between Mr. Burnham and Mr. Zabriskie; none of the other allegations of the complaint were denied or referred to in any respect, so that when the matter went to trial on the special issue of the statute *all of the other allegations of the complaint were admitted*. See authorities cited in our opening brief, p. 28, subd. III. Therefore such admissions included the formation of the 1929 conspiracy, its continuance, and all of the overt acts alleged. **The cause of action charged upon was solely the conspiracy formed in November 1929, not upon any of the conspiracies**

involving or surrounding the fraud order, the price cut, or other conspiracies formed prior to the conspiracy charged upon, viz. that of November, 1929. **Appellees make no reference whatsoever to the cause of action sued upon but attempt to confuse the issue by a discussion of such matters as the price cut, the fraud order, and like conspiracies which antedated the conspiracy of '29 and which in themselves form no part of such conspiracy.** The fact that appellees may have continued such activities and overt acts after the formation of the '29 conspiracy does not make such prior conspiracies any part of the conspiracy sued upon.

Therefore, under the pleadings the sole question which should have been presented to the jury was whether or not appellant had discovered or should have discovered the existence of the November 1929 conspiracy sued upon, within the period of the statute of limitations.

Instead, the Court permitted appellees to confuse the issue and make each one of the conspiracies surrounding the overt acts, *even those performed prior* to the formation of the '29 conspiracy, causes of action within appellant's complaint. Such of course was pure error, for it rested entirely with appellant as to which cause of action it elected to charge upon, and having made such election of the conspiracy of November 1929 as its cause of action, neither the Court nor appellees had any right to inject any other causes of action into the case.

The present action is based upon a conspiracy to violate the anti-trust law, resulting in damage to appellant. The overt acts are no part of the "cause of action." As we have stated, it was appellant's right to choose its cause of action; it did so by basing its complaint upon the violation

of the anti-trust acts by appellees in the making of the conspiracy of November 1929. That was a separate and distinct offense, as was each of the conspiracies involving the fraud order, the price cut, and other overt acts. Appellant could have sued upon any of such conspiracies forming the basis of any of such overt acts but did not elect to do so. Therefore the issues presented herein are solely and wholly as to the facts and the damage resulting and growing out of the conspiracy of November 1929, and the other conspiracies and overt acts referred to by appellees form no part of such '29 conspiracy and the Court should not have permitted evidence as to any of the same, for by no stretch of the imagination could it be contended that such overt acts performed prior to November 1929 constituted either knowledge or discovery, and certainly not belief, of a conspiracy formed long thereafter, to wit, in November 1929.

The law is well settled that overt acts form no part of a conspiracy, and that the conspiracy is the "cause of action." Of course, if appellant cannot prove damage resulting from the conspiracy it cannot recover, but that does not mean that appellees have not violated the law and committed an illegal act by the formation of the conspiracy of 1929. No plaintiff can recover legal damages without proving damage under any cause of action, but that does not mean that a plaintiff cannot have a cause of action without *legal* damage.

In *Nash v. United States*, 229 U.S. 373; 33 S.Ct. 780 it was held:

"No overt act need be alleged in an indictment charging a conspiracy to restrain or monopolize interstate trade or commerce, under the antitrust act of

July 2, 1890, since that statute does not make the doing of any act other than the act of conspiring a condition of liability.”

Also see *United States v. Socony etc.*, 310 U.S. 150; 60 S.Ct. 811, where it was held:

“Proof that there was a conspiracy, that its purpose was to raise prices, and that it caused or contributed to a price rise, is proof of the actual consummation or execution of an unlawful conspiracy in restraint of trade and commerce. Sherman Anti-Trust Act, Sec. 1, 15 U.S.C.A. Sec. 1.”

See the discussion on this point on p. 219 of the Official Report.

Likewise, see *United States v. New York etc.*, (5th Cir.) 137 F.2d, 459; (Cert. denied 320 U.S. 783); at 463 the Court said:

“* * * *Nash v. United States*, 229 U.S. 373, 33 S.Ct. 780, 57 L.Ed. 1232, and *United States v. Socony Vacuum Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129, settle it that the offense of conspiracy under the Sherman Act is complete when the agreement or conspiracy is formed, that jurisdiction and venue lie in the district where it was formed, and that it is not necessary to allege the commission of an overt act. It is settled, too, that a conspiracy in restraint of trade is, or may be, a continuing offense, *United States v. Kissel*, 218 U.S. 601, 31 S.Ct. 124, 54 L.Ed. 1168, and that ‘A conspiracy thus continued in effect renewed during each day of its continuance,’ *United States v. Borden Co.*, 308 U.S. 188, 60 S.Ct. 182, 190, 84 L.Ed. 181. As each new member later joins the conspiracy, he in effect makes the agreement then and there to become a party to it.”

Also, on p. 464 the Court said:

“* * * It is not the form of the combination or the particular means used, but the result to be achieved that the statute condemns. It is equally clear that it is of no importance whether the means used to accomplish the unlawful objective are in themselves unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts, yet if they are a part of the sum of the acts which are relied upon to effectuate the conspiracy the Sherman Act forbids, they fall within the condemnation of the statute.”

In *United States v. General Motors etc.*, 121 F.2d it was said (pp. 404 and 405):

“* * * proof of the conspiracy would have been sufficient to sustain a conviction even if the conspiracy had never been carried out. This is true because the offense condemned by the Sherman law is the act of conspiring, and neither actual restraints nor overt acts need be proved. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 252, 60 S.Ct. 811, 84 L.Ed. 1129.”

Also see *United States v. Armour* (10 Cir.) 137 F.2d, at 271.

The same rule is applicable to civil actions under Sec. 15. See *Albert Pick-Barth Co. v. Mitchell etc.*, 57 F.2d, 96 (Cert. denied 286 U.S. 552; 52 S.Ct. 503), which was a civil action for treble damages. On p. 102 the Court stated:

“To constitute an offense under section 1 of the Sherman Act, it is not necessary, if a conspiracy is proven, the purpose and intent of which was to eliminate by unfair means a competitor in interstate trade, to show that the public was affected, and to what

extent. Nor is it necessary under this act, as it is at common law, to prove any overt acts in order to constitute the offense defined in section 1; but if overt acts are proved in furtherance of the offense defined in section 1, and anyone is thereby injured in his business or property, the conspirators under section 7 of the Act are liable therefor."

The *Pick-Barth* case cites

Chattanooga Foundry etc. v. Atlanta, 203 U.S. 390;
27 S.Ct. 65,

which was also a civil action and which holds that Congress "had power to give an action for damages to an individual who suffers by breach of the law" (citing a case in support). Pp. 396-397 Official Reports.

These authorities confirm the claim expressed above: That the conspiracy formed by appellees *constituted in itself a wrong which immediately gave to appellant its cause of action*. They demonstrate the distinction between *the cause of action* (the conspiracy) and *the damages suffered by appellant as a result thereof* (the overt acts).

Therefore, appellant having selected its cause of action, neither the Court below nor appellees could force upon it as issues in this case other and entirely different causes of action such as the fraud order and the price cut.

In *United States v. Southern Pacific Co.*, 75 F. Supp. 336 (Or.) p. 339, subd. 2, the Court said:

"It is a cardinal rule in all courts and tribunals that the filing of an action fixes the controversy. In no system of pleading can after occurring events be litigated except by filing of a supplemental pleading by consent of the court." (Citing cases)

The Court also said (p. 339):

“* * * A new and distinct lawsuit should never be injected into a case by filing a supplemental pleading. This rule is inherent in all systems of pleading, common law, code or federal. It is required by the necessities. Confusion would otherwise result. Here the previous discussion shows that subsequent events raised entirely new and different issues for determination.” (Citing *Southern Pacific Co. v. Conway*, 8 Cir., 115 F.2d 746.)

For this reason appellant objected to any testimony, on the cross-examination of Mr. Burnham, along these lines, but all of such objections were overruled (Tr. pp. 405 to 408).

II.

EVEN IF THE EVIDENCE OF SUCH PRIOR OVERT ACTS COULD POSSIBLY BE HELD ADMISSIBLE, THE PRE-TRIAL ORDER OF THE LOWER COURT WAS ERROR.

To refresh our memories as to the provisions of the pre-trial order, permit us to set it forth again (Tr. p. 195):

“At any time from May 17, 1929, to October 10, 1939, did plaintiff know or have good cause to believe that its business had been theretofore damaged by acts of the defendants in violation of the Anti-Trust laws of the United States?”

Though not expressly so stated, the offer of such evidence by appellees was for the purpose of meeting the question presented by the pre-trial order and to prove that appellant did know *or have good cause to believe* that its business had been theretofore damaged. “Theretofore”

refers to a period antedating May 17, 1929, which was some five months prior to the formation of the November 1929 conspiracy sued upon. This was for the purpose of overcoming appellant's charges of fraud and concealment of such conspiracy sued upon and of the fact that it did not, due to such fraud and concealment, discover the conspiracy of November 1929 until the action by the Government in the fall of 1944 against most of these appellees. Mr. Burnham, president of appellant, testified (Tr. pp. 754-5) as follows:

"Q. When did you first obtain any knowledge of the so-called 1929 conspiracy which you have described in detail in your complaint?

A. In the fall of 1929.

Q. (By Mr. Carr): 1929?

A. 1944, excuse me. I was thinking of the 1929 agreement.

Mr. Carr: Mr. Reporter, what was the previous answer of the witness?

(The reporter reading):

'In the fall of 1944.'

Q. (By Mr. Carr): Let me ask you this: At any time prior to the fall of 1944, did you believe that such a conspiracy as alleged in your complaint, known as the 1929 conspiracy, existed?

A. No."

Further, Mr. Burnham testified (Tr. p. 759):

"Q. Did you believe that such a conspiracy as alleged in your complaint and known as the 1929 conspiracy existed?"

A. No."

Likewise, further testimony (Tr. pp. 760-61):

“Q. Mr. Burnham, did you ever prior to the fall of 1944 hear of any agreement entered into by the defendants in reference to price cuts or monopolization of the borax industry?

A. Could you state that question again?

Mr. Harrison: Just a moment, please. I do not understand what the question means unless it is a mere repetition of the previous question.

Mr. Carr: No, it is another thing, another phase. Will you read the question, Mr. Reporter?

(Question read.)

A. Not by these defendants in our case.”

The amendment to the complaint, par. 81a, alleges that appellant had no knowledge of the conspiracies or combinations set forth, or the intent or purpose of the defendants until on or about the commencement of the action of the United States v. certain defendants herein, filed September 14, 1944 in the United States District Court for the Northern District of California.

The question of the correctness of such pre-trial order is not directly discussed by counsel in their brief; the only reference thereto is sub-paragraph 1, p. 72, and even that does not squarely discuss the subject. Counsel attempt to escape the error inherent in the pre-trial order by claiming that there was no fraudulent concealment charged or proved, and that the present is not a case based on fraud. Those questions will subsequently be discussed herein, but for the purpose of the point presently at issue, they have no bearing. The fact that appellees admitted, by their failure to deny any of the allegations of the complaint other than the three paragraphs described above,

completely refutes the claims made under this subdivision 1, page 72. The lower Court must have considered that the question of "fraud and concealment" was present or it never would have made its pre-trial order in the form that it did. Appellees pleaded the statute of limitations and appellant in effect alleged an estoppel against such plea due to fraud, invoking the rule that where fraud is present the statute does not begin to run until the "discovery of such fraud." The rule is well set forth in the case of

Sears v. Rule, 27 Cal. 2d, 131; 163 Pac. 2d, 443.

On p. 147 of California Reports the Court laid down the rule:

"Where an action is based 'on the ground of fraud' and therefore within the three-year statute of limitations, the cause of action is not deemed to have accrued until the discovery of the facts constituting the fraud. (Code Civ. Proc., Sec. 338, subd. 4.) When the right of action is not based upon fraud the exception provided in subdivision 4 of section 338 is not available to the plaintiff. *Nevertheless*, if the defendant, after committing the wrongful act, has fraudulently concealed the facts from the plaintiff, who by reason of such concealment did not discover that he had a right of action until too late to sue, the defendant will be estopped from taking advantage of his own wrong by asserting the statute of limitations. (*Pashley v. Pac. Elec. Ry. Co.*, 25 Cal. 2d 226, 231 (153 P.2d 325). In such a case, in determining when the plaintiff discovered, or should have discovered, the facts giving rise to his cause of action, the same rules govern that are applicable in cases falling within subdivision 4 of section 338 of the Code of Civil Pro-

cedure. (Kimball v. Pacific Gas & Elec. Co., 220 Cal. 203, 215 (30 P.2d 39).)''

The last portion of the above quotation, commencing with the word "nevertheless" sets forth the present situation exactly. Here appellees committed a wrongful act by entering into the conspiracy of 1929 in violation of Secs. 1 and 2 of the antitrust act. Pursuant to such conspiracy they inflicted grievous damages upon appellant. Appellant had no knowledge of or reason to believe in the existence of such '29 conspiracy until long after the infliction of the damages in question. It discovered such conspiracy when the Government instituted its proceedings in 1944. By that time the statute of limitations, *so far as a strict action at law was concerned*, barred an action at law by appellant under the antitrust laws *but* appellees having concealed from appellant their wrongful conspiracy of November 1929, and having fraudulently carried on the same, *are estopped* from pleading the statute in this present action. It is there that Equity steps in to remedy what otherwise would be a grievous injustice. *Estoppel* is cognizable only in equity, hence the present case belongs on that side of the court, and the rule of *Holmberg v. Armbrecht*, 327 U.S. 392; 66 S.Ct. 582 becomes applicable. As stated in the *Holmberg* case (327 U.S. 392, subds. 9 to 12 incl.):

"* * * If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time.

"Equity will not lend itself to such fraud and historically has relieved from it. It bars a defendant

from setting up such a fraudulent defense, as it interposes against other forms of fraud. And so this court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party'. *Bailey v. Glover*, 21 Wall. 342, 348, 22 L.Ed. 636; and see *Exploration Co. v. United States*, 247 U.S. 435, 38 S.Ct. 571, 62 L.Ed. 1200; *Sherwood v. Sutton*, Fed. Cas. No. 12,782, 5 Mason 143.

"This equitable doctrine is read into every federal statute of limitation. If the Federal Farm Loan Act had an explicit statute of limitation for bringing suit under Sec. 16, the time would not have begun to run until after petitioners had discovered, or had failed in reasonable diligence to discover, the alleged deception by Bache which is the basis of this suit. *Bailey v. Glover*, *supra*; *Exploration Co. v. United States*, *supra*; *United States v. Diamond Coal Co.*, 255 U.S. 323, 333, 41 S.Ct. 335, 337, 65 L.Ed. 660. It would be too incongruous to confine a federal right within the bare terms of a State statute of limitation unrelieved by the settled federal equitable doctrine as to fraud, when even a federal statute in the same terms would be given the mitigating construction required by that doctrine."

This case must be decided on the present condition of the pleadings, and all of the many and vicious wrongs set out in the complaint and inflicted upon appellant by appellees are admitted for the purposes of this motion, and

stand as wrongful acts committed by appellees pursuant to the conspiracy entered into by them in November 1929. If the concealment by Bache in the *Holmberg* case of his ownership of the shares of stock there in question called for application of the doctrine of estoppel as was there applied, certainly the many illegal, vicious and unfair activities of appellees as set forth in the complaint herein likewise constitute a basis for the application of such doctrine, an equitable principle of justice and fair play.

As stated, estoppel is only applicable in Equity, and Equity having taken jurisdiction through its estoppel arm, will hold the case and take it through to its conclusion.

Counsel claim (p. 67) that there is no evidence of fraud or concealment in the present cause. Wholly aside from the allegations of the complaint as to such fact, **a conspiracy to destroy another financially is in itself a fraud upon the party against whom it is directed.** (The conspiracy charged upon herein is admitted.)

An examination of many cases and texts leads to the inescapable conclusion that such statement is absolutely correct. The conclusion stated is self-evident and constitutes an expression of natural justice. The word "fraud" covers many situations and certainly a conspiracy to injure another is in itself a fraud upon the party against whom such conspiracy is directed. In

37 *C. J. Sec.*, p. 204

it is said in part:

"* * * In its (fraud's) general or generic sense, it comprises all acts, omissions, and concealments involving a breach of legal or equitable duty and resulting in damage to another, * * *"

37 *C.J.S.*, page 221:

“Fraud may be committed by actions as well as by words and the elements are the same whether it originates in a conspiracy or is committed by an individual without aid or cooperation.”

Here the conspiracy charged, and admitted, was a violation of the anti-trust laws, Secs. 1 and 2 thereof, and certainly a conspiracy to violate such laws, with the purpose and intent of destroying appellant, constituted a fraud upon appellant. Conspiracies such as the present are self-concealing. Conspirators do not shout their purposes from the housetops.

Fraud is defined in

U. S. v. Proctor & Gamble Co., 47 F. Supp. at p. 678 (D.C. Mass.)

as follows:

“Broadly, ‘fraud’ has been defined as ‘any artifice whereby he who practices it gains, or attempts to gain, some undue advantage to himself, or to work some wrong or do some injury to another, by means of a representation which he knows to be false, or of an act which he knows to be against right or in violation of some positive duty.’ *Commonwealth v. Tuckerman*, 10 Gray, Mass., 173, 203, cited with approval in *Commonwealth v. O’Brien*, 305 Mass. 393, 397, 398, 26 N.E.2d 235. But, as was stated in *Foshay v. United States*, 8 Cir., 68 F.2d 205, 211: ‘To try to delimit “fraud” by definition would tend to reward subtle and ingenious circumvention and is not done.’ ”

37 *C. J. Sec.* at p. 204 fraud is defined as

“An act or course of deception deliberately practiced with the view of gaining a wrong or unfair ad-

vantage; deceit; trick; an artifice by which the right or interest of another is injured." (Cites in support *Eliason v. Wilborn*, 167 N.E. 101; affirmed 50 S.Ct. 382; 281 U.S. 547.)

The quotation is from the opinion of the Illinois Supreme Court, and is taken from *Storey's Equity Jurisprudence*, Vol. 1, Secs. 186, 187. This case was affirmed by the Supreme Court without any discussion of the question of fraud but the affirmation of the Illinois court's decision indicated approval by the Supreme Court of such holding as to fraud.

Certainly under such definition the conspiracy here charged and admitted constituted a fraud.

In *Wells v. Zenz*, 83 Cal. App. 137 the Court in discussing fraud states:

"* * * No definite and invariable rule can be laid down as a general proposition defining fraud, as it includes all surprise, trick, cunning, dissembling, and unfair ways by which another is deceived. (*Armstrong v. Wasson*, 93 Okl. 262 (220 Pac. 643).)

The statutes of California expressly provide that the suppression of a fact by one who gives information of other facts likely to mislead for want of communication of the fact concealed is deceit (Civ. Code, sec. 1710), and any other act fitted to deceive is actual fraud. (Civ. Code, sec. 1572.)"

The Civil Code of the State of California states in definite terms the right of every individual to be free of injury at the hands of another. Sec. 1708 provides as follows:

"Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights."

It was held in

People v. Wisecarver, 67 Cal. App. 2d, at 207:

“Fraud may be committed by declaring to be true that which the declarant does not believe to be true; by suppressing a fact which he is bound to disclose; or by making a promise without any intention of performing it. (Civ. Code, sec. 1710; *Wells v. Zenz*, 83 Cal. App. 137, 140 (256 Pac. 484).) Moreover, any act fitted to deceive is actual fraud. (Civ. Code, Sec. 1572.)”

Further authorities in point are as follows:

In 37 *C. J. Sec.*, page 246, sec. 16(b) it is said:

“* * * If the fact concealed is peculiarly within the knowledge of one party and of such a nature that the other party is justified in assuming its non-existence, there is a duty of disclosure, and deliberate suppression of such fact is fraud.”

In *Herroz v. Capital Co.*, 27 C.(2) 349, subds. (5) and (6), it was held:

“The sellers of a house have a duty to reveal the hidden and material facts with regard to structural defects concealed by their agent and of which they have knowledge, and their failure to disclose them constitutes fraud.”

Funk & Wagnall’s New Standard Dictionary defines “Fraud” as follows:

“FRAUD: (1) An act of deliberate deception practiced with the object of securing something to the prejudice of another; a trick or *stratagem intended to obtain an unfair advantage*; craft; circumvention; trickery.

(2) (Law) *Any artifice or deception, practiced to cheat, deceive, or circumvent another to his injury.*" (Italics ours)

"Artifice" is defined as follows:

"ARTIFICE: (1) Subtle or deceptive art in contriving; trickery; strategy; as to lure by artifice.

(2) Any instance of cunning skill, intended to deceive *or outwit*; a strategem; an ingenious contrivance. *An artifice is a carefully and delicately prepared contrivance for doing indirectly what one could not well do directly.*" (Italics ours)

Please note how aptly these two definitions fit in with Sec. 1708 of the California Civil Code (cited above) requiring all to abstain from injuring the person or property of another. Under the definitions cited above, a conspiracy to destroy another financially is certainly an injury to both the person and property of another, as well as an infringement upon the rights of the person against whom the conspiracy is directed.

THE PRE-TRIAL ORDER WAS DIRECTLY CONTRARY TO THE HOLDING OF THIS COURT.

Fleishhacker v. Blum, 109 Fed. 2d, 543 cited on p. 17 of our opening. In that case the question arose as to when the statute of limitations began to run and called for an interpretation of subd. 4 of Sec. 338 of the California Code of Civil Procedure. It will be recalled that such subdivision reads as follows:

"4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the *discovery*, by the

aggrieved party, of the facts constituting the fraud or mistake.” (Italics ours)

It became necessary for this Court to define “discovery” and on that point the Court stated:

“The word ‘discovery,’ as used in the statute, means *actual knowledge*, or knowledge of facts which, in the exercise of due diligence, would have led to an actual discovery of the fraud. Consolidated Reservoir & Power Co. v. Scarborough, 216 Cal. 698, 701, 703, 16 P.2d 268; Lady Washington etc. Co. v. Wood, 113 Cal. 482, 46 P. 809; Victor Oil Co. v. Drum, 184 Cal. 226, 240, 193 P. 243; Prentiss v. McWhirter, 9 Cir., 63 F.2d 712, 715.” (Italics ours)

Note, please, that “discovery” means “actual knowledge,” not “belief,” on the part of the complaining party that he had been injured. “Belief” or “suspicion” play no part. We respectfully submit that the *Blum* case, standing alone, reverses this case. All of the California cases cited on p. 16 of our opening, particularly *Hansen v. Bear Film Co.*, 28 Cal. 2d, 154; 168 P.2d, 946, subs. 11 and 12, fix the initial date of the running of the statute as of the *discovery* of the cause of action, not when plaintiff “believed” that he had been injured by the wrong of the defendant. *Holmberg v. Armbrecht*, supra, is also controlling on this point.

Of course, every time appellant was injured by one of these overt acts it knew that it was being hurt, but mere “suspicion” or “belief” that appellees were responsible therefor and were acting in concert in violation of the anti-trust laws, did not start the running of the statute,

for until the *cause of action* was “discovered” in September of 1944, the statute did not begin to operate.

Suspicion is not discovery.

Kalkruth v. Resort Properties, 57 Cal. App. 2d, 146;
134 Pac. 2d, 513 (cited on p. 19 of our opening);
American Surety Co. v. Pauly, 170 U.S. 133 (cited
pp. 18 and 19 of our opening).

“Belief” is defined in Webster’s International Dictionary of the English Language in part as follows:

“Belief” admits of all degrees, *from the slightest suspicion to the fullest assurance.*”

Therefore, when the lower Court fixed “belief” as one of the basic tests of its pre-trial order, it in effect held that “belief” of appellant, *based on the slightest suspicion*, that it had been damaged through the violation of the anti-trust laws by appellees, started the running of the statute; such holding was contrary to the ruling of both the United States Supreme Court (*Holmberg* case) and of this Court (*Fleishhacker v. Blum*) as well as that of the California courts. Neither “belief” nor “suspicion” constitutes the starting point of the statute of limitations—the time of “discovery” of the cause of action fixes such starting point.

We therefore respectfully submit that the pre-trial order of the lower Court was error in law as well as in fact. In no authorities is it even intimated that “belief” on the part of a plaintiff that the wrongs suffered by him had been caused by defendants pursuant to a violation of law, or that defendants had committed such violation, constituted “discovery” within the meaning of the statute

of limitations or of the equitable doctrine laid down in the *Holmberg* case. This Court has also so spoken in the *Fleishhacker* case, *supra*, and which holding has never been questioned. The insertion of the word "belief" in the pre-trial order destroyed it from a legal standpoint and the fixing of the date of May 17, 1929 (almost six months prior to the formation of the conspiracy of '29—the cause of action) from a factual basis.

III.

AS TO THE FOSTER & KLEISER CASE.

At the outset of counsel's brief this statement is made:

"The case is governed by the decision of this Court in *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F.2d, 742 (Cert. den. 299 U.S. 613)."

They therefore rest their whole case on such citation. If they can find no stronger pillar, their attempt at distraction fails and their defense falls to pieces. It merely requires a careful reading of such cited case to show the correctness of the foregoing statement. It has no application of any kind to this particular case for it was a straight action at law where neither fraud nor misrepresentation nor concealment was present. The fact that time had barred a recovery *at law* due to the statute of limitations, was undisputed but plaintiff there attempted to claim fraud and concealment, in which claim he was immediately defeated as soon as the president of plaintiff testified that the general manager of defendant Foster & Kleiser, had stated directly to such president that defendant company was "out to get you," and enumerated five

companies that defendant had put out of business (p. 752). That statement had been made many more than three years prior to the commencement of the action, and gave direct notice to plaintiff of the illegal activities of defendant and of its intent and purpose to put plaintiff out of business as it had done to other companies. Certainly where there is such a bald, open statement of intent and purpose made directly to the party intended to be injured, there was no fraud or concealment, hence no basis for the application of the equitable doctrine of estoppel. Therefore the case resolved itself into a straight action at law, and the statutory period of limitations having expired, the Court had no alternative but to find for the defendant.

The facts in the present case are absolutely to the contrary, where conspiracy, fraud and concealment are all present. Here appellant was totally unaware of the activities of appellees in the formation and operation of the 1929 conspiracy. That fact is without dispute for the complaint alleges that appellant knew nothing of the '29 conspiracy or that the activities of appellees were pursuant thereto, until the fall of 1944. It is on this point that appellees led the lower Court astray and are endeavoring to do likewise on this appeal; appellees make no mention of the '29 conspiracy, neither denying the same nor the activities pursuant thereto, but attempt by referring to various other earlier conspiracies which surrounded certain overt acts, to draw the attention of the Court away from the cause of action given by the 1929 conspiracy and endeavor to claim that because appellant knew it was being damaged by such overt acts, it thereby "discovered"

the cause of action on which the complaint is based. It was due to the persuasion of appellees to such end that the lower Court made its error in settling its pre-trial order as it did.

All that the *Foster & Kleiser* case decided is that if, in an action at law, the defendant admits to plaintiff that it is determined to destroy him, there is no fraud or concealment on which to base an estoppel and thereby turn the case over to the equity side of the Court. A careful reading of the citation shows that all else is mere dicta of the writer of the opinion. While the question of continuing conspiracy is referred to it is passed by most casually and the discussion thereon was of the slightest kind—probably due to the fact that even applying the doctrine of continuing conspiracy, the statute had run, for such doctrine of continuing conspiracy does not mean that the plaintiff's right of action continuously and for all time exists; it does go to the extent that where there are a series of overt acts each one pursuant to and in furtherance of the original conspiracy, the statute will not begin to run until the performance of the last of such overt acts.

The *Foster & Kleiser* case was decided on September 22, 1936. *Fleishhacker v. Blum* was decided by this Court on February 7, 1940 and definitely lays down the definition of "discovery." It is significant that in the opinion in the *Blum* case no reference is made to the *Foster & Kleiser* case, neither in the discussion of the statute of limitations nor of the fraud claimed in that case.

The *Holmberg* case was decided by the Supreme Court February 25, 1946 and laid down definitely the rules as to

adoption by a court of equity of a cause wherein fraud and concealment exist and the statute of limitations is urged as a defense against such claim of fraud and concealment. Any statements by way of dicta or otherwise which appear in the *Foster & Kleiser* case and which would seem to be contrary to the holding of the *Holmberg* case of course disappear in the face of the latter decision.

We respectfully request a careful reading of the *Foster & Kleiser* case, when it will be realized to what extent the hopes of appellees rest only in the dicta of such opinion.

The writer of this brief yields to no one in regard and respect for the author of the *Foster & Kleiser* opinion, and perhaps the best way to leave such citation is to quote from *United States v. Burton Lines*, 165 F.2d, 993 (4th Cir.) at p. 995, subd. (1):

“These quotations from the opinions of the courts if taken literally support the Government’s position; but ‘It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but should not control the judgment in a subsequent suit * * *’ *Cohens v. Virginia*, 6 Wheat. 264, 399, 5 L.Ed. 257.”

IV.

AS TO THE CLAIM THAT THE COMPLAINT DOES NOT ALLEGE FACTS CONSTITUTING FRAUDULENT CONCEALMENT (Brief, p. 67).

Herein it is contended that a violation of the anti-trust law is not in itself fraudulent concealment. We have answered that contention in other portions of this brief where it is demonstrated that a conspiracy in and of itself

constitutes a fraud upon the party against whom the conspiracy is directed. In this portion of their brief counsel attempt to transform the "fraudulent concealment" cases cited in our opening to those involving fiduciary and confidential relationships. When fully read such cases really resolve themselves into cases of fraud—a conspiracy to conceal and to do injury to the plaintiff, thereby bringing them under the doctrine laid down in the *Holmberg* case.

The complaint charges that the 1929 conspiracy was formed (Tr. p. 34) and that charge is not denied. Pars. 63 to 68 inclusive (pp. 35-37 of the Transcript) set forth further the provisions of the '29 conspiracy. They allege the activities of the appellees pursuant to such conspiracy. In Par. 71 of the complaint (Tr. p. 39) is set forth in part the effects of the conspiracy; also the activities of appellees in the Little Placer Claim situation described in Par. 77 et seq. (Tr. p. 48). All of these allegations are admitted by the failure of appellees to deny them and do constitute "fraudulent concealment" as above defined.

V.

AS TO THE CLAIM THAT THE PRESENT IS NOT A SUIT IN EQUITY (Brief, p. 50).

This part of the brief is an effort to escape the rule of the *Holmberg* case. We do not question the authorities cited as to an ordinary suit for treble damages being an action at law. That is admitted. But where fraud enters into the situation, Equity extends its arm and draws to it the cause and all of its facts. Such was in effect the ruling in the *Holmberg* case, for aside from the concealment by Bache of his ownership of stock in the bank, the action

would have been one at law for simple recovery of the treble damages given by Congress to persons injured by violations of the Bank laws. But where defendants admit the formation of a conspiracy, and where they admit their activities thereunder, and then endeavor to escape liability by an attempt to turn the statute of limitations into a sword rather than a shield, thus eluding punishment or liability resulting from their activities, and which activities have been fraudulently concealed, the equitable doctrine of estoppel applies and the case at once resolves itself into an equity situation, with all of the principles of that branch of law applying themselves to do justice to the injured party.

Counsel (p. 53) contend that our present contention is inconsistent with our position below. In support thereof counsel cite certain statements made on the pre-trial conference in which counsel for appellant stated "The statute would have run unless we did allege and prove some excusatory facts." Such statement does not constitute any claim contrary to our present position. The "excusatory facts" referred to consisted of the equitable principle of estoppel which we have been attempting to apply throughout this whole case. In a case of this character, excusatory facts can only arise in equity. The application of excusatory facts constitutes no more than the tolling of the statute of limitations pursuant to the well established principles of equity.

**AS TO THE CONTENTION THAT A DENIAL OF A CLAIM OR
ACCUSATION OF WRONGDOING IS NOT FRAUDULENT CON-
CEALMENT (Brief, p. 69).**

Under this heading counsel claim that the denials of guilt by appellees, or some of their officials, when so charged by Mr. Burnham, did not constitute fraudulent concealment. Such is not the law. While it may be true that a defendant may not be obliged to answer and mere silence is not admission, still, if he presumes to and does reply to a charge he must speak the truth and his failure to do so constitutes fraudulent concealment. This was definitely decided in the case of

Kimball v. P. G. & E., 220 Cal. 203,

where at p. 219 it was said:

“****In this connection, it is well to keep in mind the elementary principle set forth in 12 Ruling Case Law, p. 310, section 71, as follows: ‘Even though one is under no obligation to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells, but also not to suppress or conceal any facts within his knowledge which will materially qualify those stated. If he speaks at all he must make a full and fair disclosure. To tell a half truth has been declared to be equivalent to the concealment of the other half. A partial and fragmentary disclosure, accompanied by the wilful concealment of material and qualifying facts, is not a true statement, and is as much a fraud as an actual misrepresentation, which, in effect it is. Therefore, if one wilfully conceals and suppresses such facts, and thereby leads the other party to believe that matters to which the statements

made relate are different from what they actually are, he is guilty of a fraudulent concealment.' ”

This case was affirmed and the same rule laid down in *Sears v. Rule*, supra (27 Cal. 2d, 131).

The evidence shows that on October 19, 1937 Mr. Burnham called on Mr. Emlaw and Mr. F. C. Baker, both of appellee American Potash & Chemical Corporation, and at that time both of such parties denied that there was any connection between their company and the other appellees Pacific Coast Borax Company or Borax Consolidated, Ltd. (Tr. p. 148; also 394 to 396 top of page). It was not necessary for either Mr. Emlaw or Mr. Baker to reply to the charges or inquiries of Mr. Burnham but when they did so, they were required to speak the truth, and having failed to do so, they were guilty of a fraudulent concealment. This is only one of several instances where similar situations arose.

Under this same heading counsel cite authorities to the effect that when an injured party is put on notice he must investigate to discover the exact facts, in this case the 1929 conspiracy. The evidence shows that Mr. Burnham was most assiduous in all of his efforts, both to enlist the Federal Government in an investigation of the activities of appellees, and in his own attempts to discover the facts. The complaint and also the cross-examination of Mr. Burnham fully demonstrated his endeavors over a period of years to determine the real situation and to discover the cause of the activities of appellees and to ascertain whether or not such activities were based on violations of law. The letters written by Mr. Burnham to various Government officials and introduced in the trial, bristle

with endeavors to ascertain the truth. The fact that he was unable to persuade the Government into action was not his fault; his efforts nevertheless continued and it is impossible to conceive of more earnest and active attempts to discover the facts.

The evidence shows that the concealment by appellees of their fraudulent activities was so managed that even the Government could not discover the actual facts **until after** the commencement of World War II, and it was only after the Government finally developed the facts and commenced its proceedings in the fall of 1944 that the true light dawned upon all of these parties who had been so grievously injured by appellees. The true facts were not discovered until the Government discovered that the capital stock of appellee American Potash & Chemical Corporation was owned by German interests, not by the British concerns formerly believed to be in control. Upon discovering the German ownership the Government seized the books and records of such appellee and through them discovered the conspiracy of November 1929 with all of its attendant facts. This explains the reason why Mr. Burnham could secure no satisfaction from the Government agencies to which he appealed for assistance, for up until the seizure of the German-held stock the Government had no *proof* of the existence of the conspiracy.

VII.

THE LOWER COURT ERRED IN REFUSING TO ALLOW COUNSEL FOR APPELLANT TO READ THE COMPLAINT AND ANSWER TO THE JURY.

The main answer counsel make to this very important point is that to have permitted a reading of the complaint

would have been to inflame the jury so as to prevent it from giving fair consideration to the issues to be submitted! That is certainly a novel attempt at extension of the pleas of confession and avoidance, and is to say that because the facts admitted by appellees were of such a nature as to convict them, such admission and facts should not be given to the jury. The allegations admitted by appellees constituted evidence and proof of facts which at various points in their brief appellees claim were not proved, forgetting that as long as such facts were admitted there was no need of proving them.

Counsel also contend that the lower Court granted them permission to file a special answer to raise the plea of the statute of limitations. The order also provided (Tr. p. 185) that the time of defendants to answer on the merits was extended to a date ten days after determination of the special issue, if the same was decided adversely to appellees. Instead of confining their answer directly to the plea of the statute, they also added a denial of three of the allegations of the complaint, viz. Par. 75 involving the statement of the conversation in May 1929 between Mr. Burnham and Mr. Zabriskie (Tr. p. 46), and Par. 81A alleging that the plaintiff was without knowledge of the conspiracy, that the same was fraudulently concealed from plaintiff, and was not discovered by plaintiff until September 1944 (Tr. p. 100); also Par. 81B (Tr. p. 102) also alleging concealment. On a trial of the special issue of the statute alone, appellees had no right to deny any of the *factual* allegations of the complaint. They took the complaint as it stood and based their defense wholly and solely on the statute of limitations as applied to the whole of the complaint, not to portions thereof. If the lower Court

attempted to give appellees an order to such effect it was of course improper and without the power of such lower Court so to do.

We do not question the right of appellees to answer the complaint in full and then add a special plea of the statute of limitations, but even in that situation the special trial on the statute would have been with the same force and effect as though appellees had not answered the complaint in whole, for on a special trial on such statute the latter plea would have admitted all of the allegations of the complaint for the purposes of such special issue. In other words, appellees could not blow both hot and cold—if they relied on the statute they admitted the allegations of the complaint; if they went to trial on the merits they also admit those allegations of the complaint not denied. Where the trial is solely upon the statute, appellees cannot deny in support of such plea the *factual* allegations of the complaint or any part of them. This appellees attempt to do in the present case. The special trial went forward on the complaint and the plea of the statute. The reading of the pleadings to the jury is always permissible, and the refusal of the lower Court to grant counsel for appellant such right was in itself reversible error, for it is always proper to present to the jury for their consideration the admissions of the defendants.

Furthermore, in the absence of admissions of the facts alleged in the complaint there would be nothing to which the statute of limitations could apply. In other words, if there are no facts, proved or admitted, there can of course be no plea of the statute. There must be facts alleged to which a plea of the statute could be made, and the only way of placing such facts before the jury on the trial of

the special issue on the statute, would be to read to the jury the facts set forth in the complaint.

VIII.

AS TO THE CONTINUING CONSPIRACY.

This question is discussed in our opening commencing p. 32 where we set forth the rule laid down in *United States v. Kissel*, 218 U.S. 601 and other authorities. To this appellees reply (p. 55) by the contention that the cited authorities on this point all refer to criminal cases and not to civil actions. No explanation is offered as to why the rule should be different in criminal and in civil cases. It is also contended that this Court in the *Foster & Kleiser* case, *supra*, expressly held that the *Kissel* case was inapplicable to a case of this character. As we have shown in our discussion of the *Foster & Kleiser* case, such was not the holding of this Court. At most, all the Court there did was to ignore the point and there was no holding to the extent claimed by counsel.

The *Kissel* case was an anti-trust prosecution and all that Justice Holmes said in his opinion, we respectfully submit, would cover the situation in a civil action. 15 U.S.C.A. Sec. 15 under which the present action is brought expressly provides that any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor, etc. The acts forbidden by the anti-trust laws are set forth in Secs. 1 and 2, so that these treble damage actions are brought directly under the specific provisions of the same Act, under which the same defendants may be criminally prosecuted. Neither counsel nor ourselves have been able to discover any authorities which pass directly upon this point and so

this becomes a case of first impression to the extent of such question.

The case most nearly approaching this point was

Northern Kentucky Telephone Co. v. Southern Bell Telephone, Etc., 73 F.(2), 333 (C.C.A. 6) (Cert. den. 55 S. Ct. 546).

This was a civil action in which it is apparent that the doctrine of "continuing conspiracy" would have been applied but for the fact that the last overt act was beyond the statutory period. Please note particularly the statement of the court appearing on page 335.

The case of *Maltz v. Sax, et al.*, 134 F.2d, 2 (Cert. den. 319 U.S. 772) was a treble damage action. The Court there held (subd. 3):

"The grant to persons injured through an unlawful combination or conspiracy in restraint of commerce of a cause of action for treble damages was for purpose of multiplying agencies which would help enforce Sherman Anti-Trust Act and therefore make it more effective. Sherman Anti-Trust Act, Sec. 1, 15 U.S.C.A. Sec. 1; Clayton Act, Sec. 4, 15 U.S.C.A. Sec. 15."

In *Weinberg v. Sinclair Refining Co.*, 48 F. Supp. 203, Subd. (4) p. 205 it is stated:

"The three-fold damage clause of Section 15 was designed to supply an ancillary force of private investigators to supplement the Department of Justice in law enforcement. *Quemos Theatre Co. v. Warner Bros. Pictures*, D.C., 35 F. Supp. 949."

These two authorities certainly dispose of counsel's contention (p. 55) that "a treble damage suit by a private party is not brought to vindicate the law." As such author-

ities show, the very purpose of the treble damage provision is to supplement in every way the activities of the Government in the enforcement of the Act; there is no question as to that, and such being true every benefit that accrues to a Government prosecution should likewise apply to a treble damage civil action. The theory of the treble damage provision is that the defendant should suffer a penalty because he has committed a crime. It was written with the knowledge that the Government would not be able to reach very many violations of the Act; therefore each injured party, as stated in the *Weinberg* case, was made and constituted a kind of private policeman. The purpose of giving a plaintiff treble damages has nothing to do with compensating him. It is an *in terrorem* procedure to deter other people from violating the Act and in this respect has precisely the same purpose as a criminal penalty. A rule for the collection of three times the actual damages is in effect a punishment for the commission of a crime. One of the purposes of the statute is to take the burden of enforcing the Act from Government enforcement agencies and enlist private parties in the business of law enforcement. This is shown by the section making a finding in a Government action *prima facie* evidence in a private suit. While this is a somewhat unusual provision it shows clearly that Congress realized the impossibility of the ordinary plaintiff ever proving a cause of action against a great corporation which has committed violations of the Act comparable to its size and power. It also shows the intention of Congress to induce private parties to add to the fines and penalties which the defendant must pay in a Government suit. It is in effect an invitation to plaintiffs to wait until the Government has acted and found their evidence for them.

In this case the Government has acted (Criminal and Civil Proceedings of 1944). The Government discovered the evidence that appellant needed. Appellant was in total ignorance of the facts of such '29 conspiracy and was therefore unable to produce that evidence prior to the Government action. The purpose of the statute under these circumstances would be frustrated if the statute of limitations now bars this action. This matter was not even discussed in the *Foster & Kleiser* case or in any of the other cases cited.

These thoughts apply particularly to the case at bar and distinguish it from the authorities cited by counsel because none of such cases, so far as our memory serves us, involved a cause of action of which the plaintiff was ignorant but which was brought to light by the subsequent discovery of the Government. Also, what would be the purpose of a provision allowing plaintiff to rely on the Government findings for evidence if the statute of limitations is to bar him from that unusual statutory privilege? Some of these anti-trust cases took years to try and if the rule excluding the doctrine of continuing conspiracy should be applied to cases of this character, plaintiffs would be deprived of their right to benefit by the Government's proof merely by the length of the trial. Why should the defendants have a windfall of this character simply because of the lack of manpower of the Government and its inability to fulfill its duty of uncovering anti-trust violations for the benefit of victims? That the statute intended to confer this benefit is clear. To make this benefit effective the doctrine of continuing conspiracy must be applied to treble damage actions. Furthermore, why should defendants such as the appellees be permitted to escape their

just legal and moral responsibility to those whom they have so grievously injured, after admitting, as they have on this motion, all of the vicious activities charged in the complaint, on the contention that the rule of continuing conspiracy always applied in criminal cases, should not be applied when their pocketbook is attacked—the only means which an individual has of recouping his losses caused by the wrongful activities of the defendants. The Anti-Trust Act was not passed to become a cloak and shield to wrongdoers from civil liabilities. There is no conceivable reason why a defendant in a criminal prosecution should be subject to the rule of continuing conspiracy and be exempt from it in a treble damage action brought against him for the same wrong by the party whom he has injured. The one wrong is the basis of both proceedings, viz. criminal charges and civil liability, and if the defendant is subject, as he is, to the rule of continuing conspiracy on his criminal prosecution, he certainly should have the same rule meted out to him in the civil cause. No distinction exists, and we respectfully submit that this Court has the opportunity of firmly establishing such rule.

The present case illustrates the point. Here the complaint alleges and the evidence shows a long line of overt acts after the formation of the conspiracy in November 1929, some of which were (a) the continuous prosecution of the fraud order case and the reinstatement of such order in September 1937; (b) the loss of appellant's lease at Searles Lake in January 1938; (c) the defeat of appellant's efforts to secure the reinstatement of its Searles Lake lease during 1938 and 1939; (d) the acquisition by the American Potash & Chemical Corporation, an appellee herein, in November 1939 of the deposits of borax formerly

held by appellant at Searles Lake; (e) the seventeen-year opposition to appellant's efforts to secure the Little Placer property; and (f) the continued harassment of appellant from 1929 to the date of the Government's action in 1944.

Each one of such overt acts constituted a separate conspiracy, all pursuant to the general conspiracy of November 1929, and each continuing the purposes of such general conspiracy. These activities would all be provable as against the statute in a criminal conspiracy involving the incarceration of the body of the appellees, so why should the same rule not also apply to a civil action for damages, one against the pocketbooks of the same defendants and arising out of the same violations, and under the same provision of law?

We submit that there is no logical or reasonable basis for the distinction urged by appellees.

The last overt act in the Little Placer activity began on September 1, 1944, when an action was brought by the United States Borax Co. against the Secretary of the Interior to enjoin him (Tr. pp. 48-53). On p. 62 of counsel's brief they claim that no cause of action existed arising out of the Little Placer activity, because no special damage was shown. In an action of this character general damages can be claimed in general terms, as has been done in the complaint here, Par. 81 (Tr. p. 53). It was appellees' actions pursuant to the general conspiracy that prevented the securing of the Little Placer by appellant, and the present is not a collateral attack on the judgment of the Land Office as charged by counsel on pp. 62-63. The question of whether or not the Little Placer activity constituted an overt act, and the question of damages resulting from such activity, are both questions of fact subject to proof

on the trial on the merits of this cause and are not applicable herein.

On p. 61 of their brief, subd. I, counsel claim that if any claim to damages re the Little Placer existed, it would be barred by the statute of limitations. The factual statements made above refute this contention, for the last overt act in connection with the Little Placer did not begin until September 1, 1944. The action against the Secretary of the Interior by the United States Borax Company was dismissed on August 16, 1945 pursuant to an order of the District Court of this District. At that time there was in effect a moratorium tolling the statute of limitations. On October 10, 1942 Congress passed such Moratorium Act (Ch. 589, 56 Stats. 781, 77th Congress, Second Session) suspending the running of any existing statute of limitations applicable to civil proceedings under the anti-trust Act, from that date until July 30, 1945, and on the last named date such Act was extended for an additional year, or to July 30, 1946. Accordingly such four years must be eliminated in the computation of any period of limitations or laches.

Therefore, the last overt act pursuant to the conspiracy of 1929 was started September 1, 1944 and the present action was commenced on July 3, 1945—well within the statutory period.

CONCLUSION

In concluding we respectfully contend that this case should be reversed upon the following grounds:

1. The conspiracy of November 1929 was the cause of action upon which the complaint was based. The lower Court erred in not holding the proof offered

by appellees to the conspiracy of 1929, and in allowing appellees to inject conspiracies occurring prior to November 1929 and surrounding the various overt acts; by doing so the lower Court permitted the interjection of causes of action not sued upon.

2. The lower Court erred in the form of its pre-trial order, for the same was inherently and fundamentally erroneous in law and incorrect factually. "Discovery"—or the ability to discover—not suspicion or "belief" is the test.

3. The lower Court erroneously usurped the functions of the jury. Mr. Burnham denied expressly the questions presented by the pre-trial order, and all of the evidence introduced on cross-examination (and we contend erroneously admitted) was an endeavor on the part of appellees to show knowledge on the part of Mr. Burnham, or means of knowledge, of the conspiracies surrounding the overt acts antedating the '29 conspiracy—the cause of action. None of such evidence had any relation or reference to the cause of action herein, the '29 conspiracy. Standing alone, such denials of Mr. Burnham and such admitted evidence presented questions of fact which should have gone to the jury, even if it could be presumed that the pre-trial order and the admission of such evidence were correct.

4. The present is an action in equity, becoming so when appellant raised an estoppel by urging fraud and concealment on the part of appellees. This cause is directly within the ruling of *Holmberg v. Armbrecht*, supra; therefore the State statutes of limitation are not applicable.

5. The lower Court erred in refusing to allow counsel for appellant to read to the jury the complaint and the answer thereto, for the failure of appellees to answer most of the complaint constituted an admission of the charges contained therein. Furthermore, the plea of the statute of limitations constituted an admission of all of the allegations of the complaint, and appellees were without the right to answer a portion of the complaint and ignore the balance thereof. The attempted answers by appellees to three paragraphs of the complaint are of no moment and should not be considered, for they cannot call to their assistance a denial of factual allegations to uphold them in urging their purely legal plea of the statute of limitations.

6. The conspiracy of November 1929, which is the basis of the cause of action charged upon, was a continuing conspiracy, and the statute of limitations did not commence to run until the completion on August 16, 1945 of the last overt act performed pursuant to such conspiracy and which completion was prior to July 30, 1946, when the moratorium tolling the statute of limitations expired.

Respectfully submitted,

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United States
Circuit Court of Appeals

For the Ninth Circuit

BURNHAM CHEMICAL COMPANY, a corporation,

Appellant,

vs.

BORAX CONSOLIDATED, LTD., a corporation,
PACIFIC COAST BORAX COMPANY, a corporation,
UNITED STATES BORAX COMPANY, a corporation, and
AMERICAN POTASH & CHEMICAL CORPORATION, a corporation,

Appellees.

Reply of Appellees Borax Consolidated, Ltd., Pacific Coast Borax Company, and United States Borax Company to "Supplemental Memorandum on Behalf of Appellant"

Together with
a Memorandum Relative to
the Absence of a Formal Verdict

FILED

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United States
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BURNHAM CHEMICAL COMPANY, a corporation,

Appellant,

vs.

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UNITED STATES BORAX COMPANY, a corporation, and
AMERICAN POTASH & CHEMICAL CORPORATION, a corporation,

Appellees.

Reply of Appellees Borax Consolidated, Ltd., Pacific Coast Borax Company, and United States Borax Company to "Supplemental Memorandum on Behalf of Appellant"

This is in reply to appellant's Supplemental Memorandum filed July 16, 1948. In that memorandum appellant has completed the shift from the theories of its opening brief which had already begun in its reply brief. The cases cited in the Supplemental Memorandum are either altogether irrelevant or else support appellees, as for example, *Cope v. Anderson*, 331 U.S. 461.

I. THERE HAS BEEN NO CHANGE IN THE RULES CONCERNING THE STATUTE OF LIMITATIONS IN PRIVATE DAMAGE SUITS UNDER THE SHERMAN ACT.

It has long been understood that in actions in the federal courts on federally created causes of action the appropriate state statute of limitations applies, in the absence of any federal statute. In *Holmberg v. Armbrrecht*, 327 U.S. 392 (1946), the Supreme Court held that *in suits in equity* on federally created causes of action the state statute of limitations did not control; but the court reaffirmed the application of state statutes *to actions at law*. To avoid the statute of limitations, otherwise unavoidable, appellant in its opening brief therefore contended that a treble damage action under the Sherman Act is a suit in equity. We demonstrated that this is not so (Brief pp. 50-53) and pointed out that in the *Holmberg* case the court clearly referred to actions for treble damages under the Sherman Act as being actions at law and therefore subject to the state statutes. We now observe that in one of the cases cited in appellant's Supplemental Memorandum, *Mercoid Corporation v. Mid-Continent Co.*, 320 U.S. 661, the court (at p. 671) cited with approval the decision of Mr. Justice Holmes in *Fleitmann v. Welsbach Street Lighting Co.*, 240 U.S. 27, that an action for damages under the Sherman Act can only be brought at law.¹

Consequently, in its Supplemental Memorandum appellant shifts reliance to another but altogether nebulous argument, to the effect that the statute should be applied "flexibly," whatever that may mean. In this connection appellant cites *Cope v. Anderson*, 331 U.S. 461.

But that decision did not enlarge the exception stated in the *Holmberg* case to the rule that the state statutes of limitations

1. Cf. also, *Venner v. Pennsylvania Steel Co.*, 250 Fed. 292, 296: "Obviously such suits [to recover damages under the Sherman Act] include only actions at law."

apply. On the contrary, it limited the exception. *Cope v. Anderson* reverted to the rule that suits in federal courts on federally created statutes are indeed governed by state statutes of limitations, and it applied the rule to a suit in equity. It limited the exception of *Holmberg* to a case where not only was the suit in equity but where also the gravamen of the action was equitable, and it refused to apply the exception when equity had jurisdiction only because of collateral circumstances such as multiplicity of parties. Contrary to appellant's contention, nothing in the case even remotely suggests that in any action at law the rule applicable to suits in equity may possibly apply. The court said (p. 463):

"Even though these suits are in equity the states' statutes of limitations apply. For it is only the scope of the relief sought and the multitude of parties sued which give equity concurrent jurisdiction to enforce the *legal obligation* here asserted. And equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy. *Russell v. Todd*, 309 U.S. 280, 289 and cases cited. See also *Guaranty Trust Co. v. York*, 326 U.S. 99; *Holmberg v. Armbrrecht*, 327 U.S. 392, 395-396."²

2. The difference between *Holmberg v. Armbrrecht* and *Cope v. Anderson* is that the former was a creditor's bill to recover on stockholder's liability under the federal Farm Loan Act, while the latter was a suit by a receiver to recover an assessment against stockholders under the National Banking Act. The difference between the two is clearly explained by Mr. Justice Holmes in *Wheeler v. Greene*, 280 U.S. 49, and in *Christopher v. Brusselback*, 302 U.S. 500 at 502. Under the National Banking Act the Comptroller of the Currency may levy an assessment on stockholders of the bank in fixed amounts and the receiver may sue to recover the assessment. The obligation is therefore a legal one as distinguished from equitable, although recourse to equity may be had to avoid multiplicity of suits. But the Farm Loan Act does not provide for assessments and confers no right on the receiver to sue to recover. The only relief is by a creditor's bill against all stockholders to recover, not any fixed sum, but whatever may be necessary to pay the creditors. The suit is therefore necessarily in equity and could never be at law.

The obligation under the Sherman Act to pay damages is purely a legal obligation, not only in form but in substance. The state statute of limitations therefore applies, and no exceptions whatever have been intimated by the courts. This very fact is clearly recognized both in *Holmberg v. Armbrrecht* and in *Cope v. Anderson*, supra, which do not whittle away the settled rule but consciously reaffirm it.

In *Holmberg v. Armbrrecht*, supra, the court had said (p. 395):

"Apart from penal enactments, Congress has usually left the limitation of time for commencing actions under national legislation to judicial implications. As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation. See *Campbell v. Haverhill*, 155 U.S. 610; *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390; *Rawlings v. Ray*, 312 U.S. 96."

In the *Cope* case the court said (p. 466):

"Moreover, limitations on federally created rights to sue have similarly been considered to be governed by the limitations law of the state where the crucial combination of events transpired. *Seaboard Terminals Corp. v. Standard Oil Co.*, 24 F. Supp. 1018, 104 F.2d 659; *Bluefields S.S. Co. v. United Fruit Co.*, 243 F. 1, 19-20. See *Campbell v. Haverhill*, 155 U.S. 610; *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390, 397."

The *Chattanooga* case, cited in both of these passages, and the *Seaboard* and *Bluefields* cases, cited in the quotation from *Cope v. Anderson*, were all actions for treble damages under the Sherman Act, and in every one of these antitrust cases it was held that such an action is governed by the state statute of limitations. In the *Bluefields* case the court held that the statute began to run when the damage occurred, and the decision was

cited and followed by this Court in *Foster & Kleiser Company v. Special Site Sign Co.*, 85 F.2d 742.

Reference may also profitably be made to *Campbell v. Haverhill*, 155 U.S. 610, since (1) it was cited in each of the passages quoted above from the *Holmberg* case and from *Cope v. Anderson*, (2) it was the basis of the Supreme Court's decision in the *Chattanooga* case that the state statute applies to suits under the Sherman Act, and (3) the plaintiff there made, and the court expressly rejected, exactly the kind of arguments which appellant here has made to the effect that, when a cause of action has been created under federal law and involves a public interest, the state statute of limitations should not be applied or should be applied "flexibly." *Campbell v. Haverhill* was a suit for patent infringement, and the court said (p. 616):

"But why should the plaintiff in an action for the infringement of a patent be entitled to a privilege denied to plaintiffs in other actions of tort? If States cannot discriminate against such plaintiffs, why should Congress by its silence be assumed to have discriminated in their favor? Why, too, should the fact that Congress has created the right, limit the defences to which the defendant would otherwise be entitled? Is it not more reasonable to presume that Congress, in authorizing an action for infringement, intended to subject such action to the general laws of the State applicable to actions of a similar nature? In creating a new right and providing a court for the enforcement of such right, must we not presume that Congress intended that the remedy should be enforced in the manner common to like actions within the same jurisdiction?

"Unless this be the law, we have the anomaly of a distinct class of actions subject to no limitation whatever; a class of privileged plaintiffs who, in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions. The result is that users of patented articles, perhaps innocent of any wrong intention, may be fretted by actions brought against

them after all their witnesses are dead, and perhaps after all memory of the transaction is lost to them. This cannot have been within the contemplation of the legislative power. As was said by Chief Justice Marshall in *Adams v. Woods*, 2 Cranch, 336, 342, of a similar statute: 'This would be utterly repugnant to the genius of our laws. In a country within which not even treason can be prosecuted after the lapse of three years, it can scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.'

"Whatever prejudice there may have been in ancient times against statutes of limitations, it is a cardinal principle of modern law and of this court, that they are to be treated as statutes of repose, and are not to be construed so as to defeat their obvious intent to secure the prompt enforcement of claims during the lives of the witnesses, and when their recollection may be presumed to be still unimpaired. As was said of the statute of limitations by Mr. Justice Story (*Bell v. Morrison*, 1 Pet. 351, 360): 'It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time, but to afford security from stale demands, after the true state of the transactions may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses.'"

In this connection we may also note that in *Kavanagh v. Noble*, 332 U.S. 535, the Supreme Court, speaking of statutes of limitation, said (p. 539):

"Such periods are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary."

Campbell v. Haverhill also calls attention to another fallacy in appellant's argument. Appellant assumes that its accusations of wrongdoing are true and on that assumption beseeches the court to circumvent the statute of limitations in order to

bring wrongdoers to book. But where there has been delay beyond the period of limitations, neither law nor equity will assume that the asserted claim is a just one or that allegations of wrongdoing are correct and then approach the problem as one of barring or not barring a just claim. Charges of conspiracy, like charges of fraud, are readily made, and a burden of explaining facts actually innocent can sometimes too readily be cast upon a defendant at a time when it is deprived of the full ability to proffer explanation.

Because courts may be incapable of determining wherein lies the truth in occurrences long past, due to the moldering effect of time, statutes of limitation interpose a b̄ar.

No Equitable Issues Are Present.

Furthermore, we inquire, what are the elements which appellant's memorandum claims to be present and which serve to import into this case any equitable issue so as to destroy the certain application of the statute of limitations and introduce the shapeless quality which appellant calls "flexibility"? Appellant speaks (Memo. pp. 8, 9) of "fraud or concealment" and "estoppel."

Now, even if fraud were involved in the case, that would not make it a suit in equity or import an equitable issue. Fraud may entitle one to equitable remedies such as injunction or cancellation, but if he sues for damages, his action is purely and simply a tort action at law; at common law it was an action of trespass on the case (12 *Cal Jur.*, 785, 786). *Ambler v. Choteau*, 107 U.S. 586, was a suit instituted in equity "to recover damages alleged to have been sustained through an unlawful conspiracy to cheat the complainant out of his interest in a certain invention." In holding that a court of equity had no jurisdiction of the suit, the Court, speaking through Mr. Chief Justice Waite, said (p. 590):

"Upon full consideration, we have no hesitation in saying that it presents no case for such relief in equity as is asked. If, as is more than once distinctly alleged, the object of the suit is to recover damages for an unlawful and fraudulent conspiracy to cheat Ambler out of his interest in the original invention which is the subject matter of the controversy, the remedy is clearly at law and not in equity."

And again (p. 591):

"The words 'fraud' and 'conspiracy' alone, no matter how often repeated in a pleading, cannot make a case for the interference of a court of equity."

To the same effect is *Philpott v. Superior Court*, 1 Cal. 2d 512.

Moreover, the present is not an action for fraud at all because a suit under the Sherman Act for damages is not an action for fraud. *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F.2d 742 (9 Cir.); *State of Oklahoma v. American Book Company*, 144 F.2d 585 (10 Cir.). And see our main brief, p. 66. Fraud enters the case only on appellant's contention that there was "a fraudulent concealment" so as to toll the running of the statute on common law principles, and, where "fraudulent concealment" is relied on for such a purpose, fraud is not the gravamen of the action and is no part of the cause of action. *Foster & Kleiser*, supra; *State of Oklahoma v. American Book Company*, supra. The cases show (cf. one of the cases cited in appellant's Supplemental Memorandum, *Abouaf v. J. D. & A. B. Spreckels Co.*, 26 F. Supp. 830, 833) that the right to recover is "wholly statutory." In the absence of the Sherman Act there would be no right to recover, and the federal courts would have no jurisdiction. Necessarily the applicable statute of limitations is California C.C.P. Sec. 338(1), governing an "action upon a liability created by statute, other than a penalty or forfeiture" and not C.C.P. Sec. 338(4) relating to "an action for relief on the ground of fraud or mistake."

Similarly, the alleged "estoppel" enters the case only as part of the claim of "fraudulent concealment," for "fraudulent concealment" does indeed rest on estoppel. But it is not true that, if an issue of estoppel enters the case, it becomes cognizable only in equity or that an equitable issue is thereby imported. The doctrine of estoppel operates at law as well as in equity, and in order to justify resort to a court of equity it is necessary to show some ground of equity other than estoppel itself. *Dickerson v. Colgrove*, 100 U.S. 578; *Home Insurance Co. v. Campbell*, 79 F.2d 588 (4 Cir.); *Smith v. Royal Insurance Co., Ltd.*, 93 F.2d 143 (9 Cir.), *cer. den.* 303 U.S. 656; 31 C.J.S. 252.

Of course, there was no "fraudulent concealment" in the present case for reasons fully shown in our brief. If appellant had pleaded and established facts constituting "fraudulent concealment," it would not be necessary for it to advance its nebulous doctrine of "flexibility," and since it has failed to establish its claim of "fraudulent concealment" it cannot disguise that claim as support for its new and nebulous doctrine.

II. THE APPLICATION OF THE STATUTE OF LIMITATIONS TO A PRIVATE LITIGANT CANNOT BE LESSENERED BY INCANTATIONS ABOUT THE PUBLIC INTEREST.

Appellant's Supplemental Memorandum makes much of a contention that the public interest is served by private suits for damages. In truth the private plaintiff recovers on the basis of his own rights alone and may not amplify them by the invocation of public interest. Curiously, in every one of the antitrust cases cited by appellant in this connection, relief was denied to plaintiff.

Appellant perverts the meaning of the passages it quotes. Thus it asserts (Memo. pp. 2, 3) that "the plea of the public interest is an essential of a proper cause of action." What the cited cases hold is merely that a private plaintiff cannot re-

cover under the Sherman Act unless he alleges and proves a violation of that Act, and a violation of the Act requires conduct of a character as would tend to restrain free competition so as to control the market in goods or services to the detriment of the public. This is shown by *Apex Hosiery Co. v. Leader*, 310 U.S. 469, and cf. *Hunt v. Crumboch*, 143 F.2d 902 (3 Cir.).³ But once a violation of the Sherman Act is shown, the private plaintiff does not recover because of the injury to the public but only if there is an injury personal to him and because of the latter fact alone. For example, appellant cites *Glenn Coal Co. v. Dickinson Fuel Co.*, 72 F.2d 885 (4 Cir.). Yet that is one of the cases relied on by us in our main brief (pp. 56-59), and in it the action was held barred by the state statute of limitations. The case places counsel's assertions in their correct light. The court said:

"To recover, the plaintiff must establish two things: (1) A violation of the Anti-Trust Act and (2) damages to the plaintiff proximately resulting from the acts of the defendant which constitute a violation of the Act. In a civil suit under this section, the gist of the action is not merely the unlawful conspiracy or monopolization or attempt to monopolize interstate commerce in the particular subject matter, but is damage to the individual plaintiff resulting proximately from the acts of the defendant which constitute a violation of the law. A mere conspiracy with intent to violate the law while it may be the basis of a valid indictment under the criminal sanction of the Anti-Trust Act, does not give rise to a personal civil suit for damages. [p. 887]

* * * * *

3. The cases cited by appellant in this connection were cases of refusal to continue to deal with, or employ a person, as a distributor or agent; this may or may not be a common-law wrong, but it is not a violation of the Sherman Act because there is no impairment of trade or commerce, it being immaterial to the public who is the distributor or agent, so long as the trade continues.

"* * * As the Anti-Trust Act does not itself prescribe the period of limitations for civil suits and there is no other federal statute applicable thereto, the period of limitations is that fixed by the local law of the State of West Virginia. *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390, 27 S.Ct. 65, 51 L.Ed. 241." (p. 890)

Appellant quotes a passage from *Mid-West Theatres Co. v. Co-Operative Theatres*, 43 F. Supp. 216, but the preceding passage and that immediately following are omitted. The court was there referring merely to leniency in admitting evidence so as to give it an understanding of the industry background. In the preceding passage it said (p. 220):

"This court was very liberal in admitting evidence of numerous other theater situations in the Detroit area where Co-Operative had acted improperly either in treatment of its own membership or other exhibitors.

"The court considered this evidence as disclosing a comprehensive and complete picture of the moving picture industry and its operations in the Detroit area. Ever since *Muller v. Oregon*, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551, 13 Ann. Cas. 957, it has become increasingly apparent that where, in a private controversy, there are questions which may seriously affect public interest, the ordinary rules of evidence and relevancy need not always be followed."

And in the immediately following passage it said (p. 220):

"But plaintiff cannot rely on a showing of wrongs to others. It can rely only on a showing of injury to itself. *Carbonic Gas Co. of America v. Pure Carbonic Co.*, D.C., 4 F. Supp. 992, 993; *Ketchum v. Denver & Rio Grande R. Co.*, 8 Cir., 248 F. 106.

"Plaintiff must show that defendants caused the injury to it, and the injury must be the proximate consequence of the acts of the defendants towards plaintiff and not towards others, and it is not enough to show that forbidden

acts were committed. *Glenn Coal Co. v. Dickinson Fuel Co.*, 4 Cir. 72 F.2d 885; *Gerli v. Silk Ass'n*, D.C., 36 F.2d 959; *Noyes v. Parsons*, 9 Cir., 245 F. 689.

"Therefore, though we permitted the parties to make an extended record, nevertheless this opinion limits its conclusions to the invaded rights of plaintiff only."

Recovery of damages to the plaintiff was denied.

The Action Is Not One to Enforce a Penalty or to Punish a Crime.

The argument at pages 9 and 10 of the Supplemental Memorandum that the "theory of the triple damage action is that the defendant should suffer a penalty because he has committed a crime," that "the purpose of giving a plaintiff triple damages has nothing to do with compensating him for injuries sustained," and "has precisely the same purpose as a criminal penalty" simply has no substance.

Indeed, if the essential nature of a suit by a private party to recover triple damages were to impose a penalty, then the applicable statute of limitations would be Cal. C.C.P. Sec. 340(1), which provides a period of only one year in

"an action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the State, except when the statute imposing it prescribes a different limitation."

In *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390, in which the Supreme Court first considered what statute of limitations applied to private suits for damages under the Sherman Act, it held that the suit was not one for a penalty, that therefore neither Rev. Stat. Sec. 1047 (Title 28 U.S.C. Sec. 791) nor the state statute "touching actions for statute penalties" was applicable. The court referred (at p. 397) to *Huntington v. Attrill*, 146 U.S. 657, 668 for the meaning of a suit for a penalty, remarking that the matter had there been

stated so fully that it was not necessary to repeat. In the latter case the court had said that the test whether a law is penal is whether the wrong sought to be redressed is a wrong to the public, considered as a community, or a wrong to the individual, considered as an individual. Thus by its citation of *Huntington v. Attrill* as controlling the Supreme Court in the *Chattanooga* case held that a private suit under the Sherman Act was merely to redress a wrong to the individual as such, and not to redress any wrong to the public.

In *Bruce's Juices v. American Can Co.*, 330 U.S. 743, cited in appellant's Supplemental Memorandum, the court said (at p. 753) that the "principle of the suit for triple damages" is that "the reparation it [the Sherman Act] permits should be measured at least roughly by the extent of the injury caused by the violation." This Court has itself said in *Hicks v. Bekins Moving & Storage Co.*, 87 F.2d 583 at 585 (9 Cir.), "An action to recover damages resulting from a violation of the Sherman Anti-Trust Act is not an action to recover a penalty," citing the *Chattanooga* case and other decisions, including *United Copper Securities Co. v. Amalgamated Copper Co.*, 232 F. 574 (2 Cir.), where the court said (at p. 577): "There can, of course, be no pretense that section 7 of the Sherman Act provides a penalty. It awards civil damages, which are made exemplary by virtue of being trebled."

In *Sullivan v. Associated Billposters and Distributors*, 6 F.2d 1000 at 1009 (2 Cir.), the court, speaking of the provision in the Sherman Act for damages to private persons, said that they "are clearly remedial. They give a cause of action to any 'person' 'injured in his business or property' by reason of anything forbidden or declared to be unlawful by the act, and they declare that 'a person' 'so injured shall recover threefold' 'the damages by him sustained.' A statute may be penal in one part and remedial in another. If a statute which is penal in part gives a remedy for an injury to the person injured to the extent that it gives such a remedy

it is a remedial statute, irrespective of whether it limits the recovery to the amount of actual loss sustained or as cumulative damages as compensation for the injury."

In *Strout v. United Shoe Machinery Company*, 195 Fed. 313, it was said (p. 317):

"Section 7 of the Sherman Law is so clear and plain in its provisions that its meaning cannot be uncertain. It is not in its nature and substance a penal action; its vindication does not rest with the state; it has been held repeatedly to be a civil remedy for private injury, compensatory in its purpose and effect. It provides for the recovery of three-fold damages sustained by the plaintiff, which are held to be exemplary damages."

**Private Rights Are Not Enlarged or Defenses Limited Because
Conferring on an Injured Party a Right to Recover Damages
May Serve as a Deterrent to Violation of the Law.**

Appellant argues that giving private individuals a right to recovery aids enforcement of the statute. That fact may, in a sense, be true, but it does not enlarge the rights of the private plaintiff or strip a defendant of his defences by some vaporous alchemic reaction. Appellant cites *Maltz v. Sax*, 134 F.2d 2 (7 Cir.), relied on by us in our main brief; the court there said (p. 5):

"While the antitrust statute is for the public benefit and its provision which gives to one damaged by an unlawful combination, three times his actual pecuniary loss, *his action to recover those damages is personal and for his own benefit. It is not one for the benefit of the public.* He must show personal, pecuniary damages. He can only recover his actual damages. Without actual damages to him, there can be no recovery. While this right of the injured party to recover damages was intended to provoke greater respect for the Act, *the individual's cause of action is personal and dependent solely upon a showing of actual damages to his business or property.*"

In *Ketchum v. Denver & R. G. R. Co.*, 248 Fed. 106 (8 Cir.), the court said, with numerous citations (p. 111):

"We are of the opinion, however, that we are not authorized to consider the equities of the case so far as the alleged violation of the Sherman Anti-Trust Act is concerned, as the plaintiff, not having shown any injury to himself, other than as a member of the general public, may not prosecute this action."

In *Bruce's Juices v. American Can Company*, 330 U.S. 743, cited in appellant's Supplemental Memorandum, the court speaking of the provisions of the statute conferring the right of recovery on private parties, said (p. 750):

"This triple damage provision to redress private injury and the criminal proceedings to vindicate the public interest are the only sanctions provided by Congress,"

thus making the contrast clear; the public interest is vindicated by a criminal prosecution by the public authorities, while the suit for damages merely redresses the private injury.⁴

Nothing in the other cases cited by appellant supports it. Appellant quotes a passage from *Mercoid Corporation v. Mid-Continent Co.*, 320 U.S. 661, wherein the court declined to grant an injunction, but appellant omits to quote the very next sentence reading, "What we have just said does not, of course, dispose of Mercoid's counterclaim for damages" [under the Sherman Act]; that counterclaim the court disposed of under

4. *Bruce's Juices v. American Can Company*, supra, was an action for the purchase price of goods, in which the defendant, represented by the same counsel who argued the cause here for appellant in this Court, sought to avoid payment by relying on the Robinson-Patman Act. The defense was rejected. Beyond the passages which we have already quoted and which support appellees here, the case is not relevant except that the Court rejected arguments by counsel similar to those he has presented here, as, for example, the argument that the action should somehow be decided on the basis that it was one "of a small business concern trying to battle a business giant" (p. 753), to which the court replied that "To decide issues of law on the size of the person who gets advantage or claims disadvantage is treacherous."

settled rules applicable in private litigation. It has always been the practice of courts of equity in giving or denying injunctive relief to consider public convenience as well as the rights of parties litigant, but no such considerations have ever been regarded in damage suits, and the present case is purely one for damages.

Appellant's Supplemental Memorandum again cites *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 338, but the case has no bearing. We have already discussed it briefly in our main brief in a footnote on page 78. The peculiar nature of the decision in that case was recognized by the Court in *Briggs v. Pennsylvania Railroad Co.*, 333 U.S., 92 L.Ed. 1018 (May 1948), where it said (p. 1020):

"While power to act on its mandate after the term expires survives to protect the integrity of the court's own processes, *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 88 L.ed. 1250, 64 S.Ct. 997, it has not been held to survive for the convenience of litigants."

The curious feature of appellant's argument is that it leads to an incongruity bordering on the absurd. From the premise that the purpose of conferring on private parties the right to sue was to aid the public in enforcing the Sherman Act by creating a private group of investigators to supplement the Department of Justice, appellant deduces the conclusion that private parties have a right to defer suing until public authorities have uncovered all necessary evidence! This is a *non-sequitur*, if there ever was one, for the premise would lead to the reverse conclusion.⁵ *Quemos Theatre Company v. Warner Brothers Pic-*

5. The illogical argument appears in bald form at page 34 of appellant's reply brief; it is there said: "One of the purposes of the statute is to take the burden of enforcing the Act from Government enforcement agencies and enlist private parties in the business of law enforcement," and four sentences later, "It is in effect an invitation to plaintiffs to wait until the Government has acted and found their evidence for them."

tures, 35 F. Supp. 949, is cited in appellant's Supplemental Memorandum for its statement that private litigants serve as an ancillary force of investigators. Yet there the remark was made to support allowance to the plaintiff in such an action of a liberal right of discovery. This, of course, reinforces the point made in our brief at pages 76 and 77, that a plaintiff has no right to defer suing until he has assembled in his possession conclusive evidence but must make use of discovery procedures.

III. CONCLUDING REMARKS IN REPLY TO APPELLANT'S SUPPLEMENTAL MEMORANDUM

This case is no different from any Sherman Act case, and appellant by its new arguments merely asks this Court to abandon settled rules and create new law. This is a case where continuously since appellant went out of business in early 1929, sixteen years before the suit was brought, it was convinced that appellees had driven it out of business in conspiracy and in violation of the Sherman Act. Whether the alleged conspiracy was formed in one year or another, whether it was express or implied, the cause of action was one and the same during the entire period. In this connection, we note a brilliant analysis in *F. L. Mendez & Co. v. General Motors Corp.*, 161 F.2d 695 (7 Cir.), *cer. den.* 332 U.S. 810. The fact that the plaintiff may not have evidence of any precise written agreement, as now claimed, is pointless, it being elementary that it is not necessary to prove a formal agreement in order to prove an unlawful conspiracy; such a conspiracy may sometimes be deduced from circumstantial evidence of concert of action. *American Tobacco Company v. United States*, 147 F.2d 93, 103; *affirmed* 328 U.S. 781, 809. Here appellant was confident for years that no "stronger evidence" than it had was necessary to prove its charges against appellees (cf. our main brief, pp. 10 and 42).

Memorandum Relative to the Absence of a Formal Verdict

By its order of June 21, 1948 this Court directed the Clerk of the District Court to transmit a supplemental record containing the verdict or certifying that there was none, and by supplemental record dated July 23rd it was certified that "no verdict was filed." In view of its request for this supplemental record we assume that the Court is interested in the bearing, if any, of the fact that no verdict was filed, and we therefore submit this memorandum on the subject.

We respectfully submit that the absence of a formal verdict is wholly irrelevant. Before stating the reasons for this submission, a chronological statement of pertinent facts may be helpful.

I. THE PERTINENT FACTS

1. Appellees moved to dismiss the complaint on the ground, *inter alia*, of the statute of limitations (R. 55, 72, 89), both on the face of the complaint alone and on the basis of documentary data.

2. By stipulation it was agreed and ordered that the motion to dismiss should also be treated as a motion for summary judgment as well as a motion to dismiss (R. 105, 107).

3. The motion for summary judgment was denied, but ruling on the motion to dismiss was reserved under *R.C.P.*, Rule 12(d), and a special trial relative to the issue of the statute of limitations was ordered under *R.C.P.*, Rule 42(b) (R. 184, 185).

4. The case was then tried before a jury on a special interrogatory (under *R.C.P.*, Rule 49(a)) in connection with the special issue.

5. Both parties moved for a directed verdict on the special interrogatory (R. 778, 779, 802).

6. The court granted the appellees' motions for directed verdict (R. 805; Minute Order of April 3, 1947 at R. 196).

7. The court so instructed the jury (R. 805).

8. In response to inquiry of appellees' counsel, the court stated that no formal verdict was necessary (R. 806).

9. The jury was then discharged (R. 807).

10. The appellees then moved to dismiss on the ground of the statute of limitations by renewing the motions theretofore made; the motions were then argued orally and ordered submitted on briefs to be filed "on 15 and 15" (R. 806-819).

11. The court then granted the motions to dismiss "for the reasons stated by the court in directing a verdict on the factual issues upon which the defense of the statute of limitations was based" (Minute Order, R. 199).

12. Judgment was then entered dismissing the action. The judgment not only recited that issue had been joined on the statute of limitations, that the factual issues thereon had been tried, and that the motion to dismiss had been granted, but it also contained the recital "a directed verdict thereon having been entered" (R. 199, 200).

13. This judgment and its recital were "approved as to form as provided in local rule 5(d)" by appellant's counsel (R. 200).

14. Appellant made no objections to the absence of a formal verdict.

15. In appealing from the judgment appellant stated the points on which it intended to rely but did not designate the absence of a formal verdict (R. 217, 218).

16. Thereafter appellant filed herein its statement of points relied on (R. 820) and made no such objection.

II. THERE ARE THREE REASONS WHY THE ABSENCE OF A FORMAL VERDICT IS AN IRRELEVANT FACT

The absence of a formal verdict is irrelevant because:

1. The procedure followed was authorized by Rule 50(b) of the *Rules of Civil Procedure*.
2. Even before the *Rules of Civil Procedure*, it was settled law that where a motion for directed verdict is granted, the decision is one of law, the act of the court, and that the return and entry of a verdict are mere formalities and unnecessary.
3. Furthermore, the judgment in this case may also be treated as one entered upon the motion to dismiss or motion for summary judgment, and, so regarded, is proper.

We consider each of these three points.

A. The Procedure Followed Was Authorized by Rule 50(b) of the Rules of Civil Procedure.

Rule 50(b) provides that when a motion for a directed verdict is made and either denied or for any reason not granted, then in the event the jury returns no verdict a party may, within ten days after the jury is discharged, move for judgment in accordance with his motion for directed verdict, and the rule concludes:

"If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

Thus, where a party moves for a directed verdict, the court may discharge the jury without receiving a verdict, and, on timely motion, enter judgment as if a verdict had been returned in favor of the moving party. *Bluebird Taxi Company v. American F. & C. Co.*, 26 F. Supp. 808; *Ryan Distributing Corporation v. Caley*, 147 F.2d 138, 142 (3 Cir.); cf. *Domarek v. Bates Motor Transport Lines, Inc.*, 93 F.2d 522 (7 Cir.).

The facts here bring the case under Rule 50(b). After the jury was discharged, the motion to dismiss was immediately brought up for consideration, i.e., it was renewed, argued and briefed. In short, a motion for judgment in conformity with the motion for directed verdict was made within the time prescribed by Rule 50(b). In due course the motion was granted for the very reasons stated by the court in directing a verdict, and judgment was entered thereon (see p. 19, *supra*).

If Rule 50(b) is subjected to minute dissection to find a ground to distinguish it, it might be suggested that it applies only where the motion for a directed verdict has been denied or not granted. This would be a narrow reading, unwarranted by the language of the rule and leading to the most incongruous results: (1) The last sentence of the rule, quoted above, demonstrates that the formal entry of a verdict is not essential to permit a judgment to be entered. This, as we show, (pages 21-27) merely recognizes what had theretofore been understood to be the law in the federal courts. (2) The rights of a party to a judgment can hardly be less where the court grants his motion for a directed verdict than where it first denies it. (3) Finally, if a verdict by the jury after direction of the verdict were necessary, it would merely mean that the order granting the motion to direct the verdict had not been consummated and was left incomplete, in other words, that the court had not yet effectively granted the motion. Consequently, the case would still fall squarely under Rule 50(b) as one where the motion has not been passed upon.

B. Even Apart from Rule 50(b), It Was Settled That, Where a Motion for Directed Verdict Is Granted, the Decision Is One of Law, the Act of the Court, and That the Return and Entry of a Formal Verdict Are Mere Formalities and Unnecessary.

In *Cabill v. Chicago, M. & St. P. Ry. Co.*, 74 Fed. 285 (7 Cir.), the District Court directed a verdict, the jury refused to

obey the direction, and the parties then stipulated that a judgment of dismissal could be entered with the same force and effect as if the jury had returned a verdict as directed. The appellate court held that the stipulation should not have been accepted but decided the case as if a verdict had been returned, because no verdict was necessary. It said (p. 290):

"The authority and duty of a judge to direct a verdict for one party or the other, when, in his opinion, the state of the evidence requires it, is beyond dispute; * * * *We deem it proper to observe here that it is not essential that there be a written verdict signed by jurors or by a foreman, and we have no doubt that, in cases where the court thinks it right to do so, it may announce its conclusion in the presence of the jury and of the parties or their representatives, and direct the entry of a verdict without asking the formal assent of the jury.*"

This passage is quoted approvingly in *Parks v. Southern Railway Co.*, 143 F. 276 (4 Cir.) at 279, and in *Huntt v. McNamee*, 141 Fed. 293 (4 Cir.), and was approved in *Moore v. Petty*, 135 Fed. 668 (8 Cir.), *cer. den.* 179 U.S. 623, where the court said (p. 675):

"While the usual and the better practice, where the result is determined by the court as matter of law, is that a formal verdict in writing be returned by the jury, the absence thereof is not fatal to the validity of the proceedings. *Cahill v. Railway*, 74 Fed. 285, 20 C.C.A. 184."

In *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, the defendant moved for a directed verdict, ruling was reserved, the jury returned a verdict for the plaintiff, the court entered judgment thereon, and the Circuit Court of Appeals reversed on the ground that the motion for directed verdict should have been granted. The appellant argued that the reversal should be accompanied by a direction to the District Court to enter judgment for the defendant, but the Circuit Court held that it had

no power to give that direction, and it merely ordered a new trial. The Supreme Court granted certiorari and held that the reversal should be accompanied by a direction to enter judgment for the defendant. It said (p. 661):

"Such a judgment of dismissal will be the equivalent of a judgment for the defendant on a verdict directed in its favor."

It also said (p. 659):

"At common law there was a well established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved; and under this practice the reservation carried with it authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation, such as non-suiting the plaintiff where he had obtained a verdict, entering a verdict or judgment for one party where the jury had given a verdict to the other, or making other essential adjustments."

This case demonstrates that there never was any necessity for actual entry of a verdict to support a judgment, where the case was such that a directed verdict was proper. In footnote 5 on pages 659, 660, the Supreme Court called attention to various English cases where judgments were entered as if on a verdict given by the jury.

While the return and entry of a verdict after it has been directed is a common practice, the whole procedure is recognized to be a mere matter of form. In *Bryan v. Louisville & N. R. Co.*, 244 Fed. 650 (8 Cir.), the court said (at p. 661):

"It is next urged that the court erred when it directed a verdict for the defendant because it asked one of the jurors only to sign the verdict. The juror who was so requested signed it, and it is claimed that it is not such a verdict as will support the judgment. It is urged that whether a case is submitted to a jury on the facts or

whether the court directs a verdict the jury must act, and that there can be no verdict without the whole jury acts. It is usual for the trial judge, when a verdict is directed, to ask the jury to select a foreman to sign the formal verdict, *but the whole proceeding is a mere matter of form.* * * * and we conclude that the request by the court that the juror sign the verdict, being a mere matter of form, was entirely sufficient without the jury selecting their own foreman. The jury could not act contrary to the decision of the court. * * * and whether the court or jury named the foreman would in no way prejudice the plaintiff."

Consequently, even if a formal verdict should have been entered, which is not the law, failure to do so was mere defect in form—indeed, an omission of the court and not of appellees, for the latter inquired of the court whether a verdict ought not to be returned and were told that it was unnecessary (see p. 19, *supra*). *R.C.P.*, Rule 61 provides:

"* * * no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

While, technically, Rule 61 applies only to the District Courts, it is recognized that the same principle applies to the Circuit Courts of Appeals. *Moore on Federal Practice*, p. 3289; *University City, Mo. v. Home Fire & Marine Insurance Co.*, 114 F.2d 288 (8 Cir.); *In re Barnett*, 124 F.2d 1005, 1011 (2 Cir.). And in any event Rule 61 merely repeats the mandate of Title 28 U.S.C., Sec. 777, which applies "in any court of the United States," and of Title 28 U.S.C., Sec. 391, applicable to appellate courts.

Moreover, if omission to have a verdict returned was objectionable practice, the error cannot be raised because no objection was made by appellant in the District Court. In *Bowman v. Atchison, T. & S. F. Ry. Co.*, 184 Fed. 697 (8 Cir.), the court said (at p. 699):

"The court sustained the motion for a directed verdict and added: 'Enter judgment for the defendant as on the verdict of the jury.' No verdict of the jury appears in the record, and the fair inference is the court dispensed with one. The plaintiff excepted generally to the ruling and the final judgment, but the court was not informed that complaint was made because a verdict was not taken in conformity with the ruling on the motion. And, though it is made the subject of assignments of error, they are not relied on in the brief.

While the court expressed disapproval of the practice of not having a verdict formally entered, it held that where the trial court was not advised that objection was taken to the absence of a formal verdict and no opportunity was thus given to the trial court to correct the omission, there was no error.

In the present case, appellant did not object to the omission of a formal verdict and, on the contrary, approved a judgment reciting that a verdict had been returned. In the *Bowman* case appellant at least assigned the omission as error when he took an appeal. Here there was no such assignment nor any designation of the point as one on which appellant intended to rely. In *Miller v. Union Pacific Railroad Company*, 63 F.2d 574 (8 Cir.) where the District Court had granted a motion to dismiss instead of directing a verdict, the Circuit Court said (p. 577):

"It is finally urged that the court erred in granting the alternative motion to dismiss the case, instead of directing a verdict. When defendant's motion was submitted, no objection was made to its form, and in the exception taken by plaintiff to the action of the court granting the motion, no complaint was made that the procedure invoked was

objectionable. Had such an objection or exception been taken at the time, the procedure could readily have been cured. The objection is purely technical and could not possibly have prejudiced the plaintiff. What is said by this court in *Bowman v. Atchison, T & S. F. R. Co.* (C.C.A. 8) 184 F. 697, 699, is here apposite."

* * * * *

"In a later case, *Wear v. Imperial Window Glass Co.* (C.C.A. 8) 224 F. 60, 63, in an opinion by the late Judge Sanborn, it is said: 'There is another reason why no reviewable question of law is presented to this court in this case. A trial court is entitled to a clear specification by exception of any ruling or rulings which a party challenges and desires to review, to the end that the trial court itself may correct them if so advised, and, if it fails to do so, that there may be a clear record of the rulings and the challenges thereof. For this purpose a rule has been firmly established that an exception to any ruling which counsel desire to review, which sharply calls the attention of the trial court to the specific error alleged, is indispensable to the review of such a ruling.'

"If there was even a technical error, it was waived, and cannot be considered by this court. * * * The rule is a just one and affords an opportunity, both to the trial court and opposing counsel, to correct the error, which in the instant case goes only to matters of form; and it enables the appellate court to determine what questions were actually presented to the lower court."

Although there had been no order directing a verdict and therefore no verdict but merely an order of dismissal, the Circuit Court concluded:

"We conclude that the court correctly directed a verdict for the defendant on the ground of contributory negligence, and the judgment appealed from is affirmed."

While formal exceptions in the trial court are no longer required, nevertheless "for all purposes for which an exception

has heretofore been necessary," the party "at the time the ruling or order of the court is made or sought" must make known to the court his objection to the proposed action and his grounds therefor. *R.C.P.*, Rule 46.

There is still another reason why the absence in the record of a written verdict is irrelevant. Here the judgment recites that a verdict was returned, and appellant approved this recital (see p. 19, *supra*). The case thus comes directly within *Moore v. Petty*, *supra*, where the court not only held that the intervention of a formal verdict was unnecessary but also said:

"Complaint is made that the trial court ignored the jury, sustained a motion for judgment, and rendered judgment thereon without the mediation of a verdict. The record, however, does not sustain this contention. *The journal entry, which imports verity, recites that the plaintiffs moved the court to instruct the jury to return a verdict; that the motion was sustained by the court; that, under the instruction of the court, the jury returned a verdict; and upon that verdict the judgment was rendered.*

In *Bowman v. Atchison, T. & S. F. Ry. Co.*, *supra*, the same court explained this to mean that in view of the recital it would conclusively be deemed that an oral verdict was returned, which was sufficient.

C. The Judgment May Also Be Treated as One Entered Upon the Motion to Dismiss, or for Summary Judgment and, So Regarded, Is Proper.

The motion to dismiss specified and urged that the complaint on its face was barred by the Statute of Limitations. On this ground alone, the motion was properly granted (see our main brief, pp. 67-72).

In addition the motion to dismiss and the motion for summary judgment were also made on the ground that the undisputed evidence showed that there was no genuine issue of fact

relative to the Statute of Limitations. In *Gifford v. Travellers' Protective Association*, 153 F.(2d) 209 (9 Cir.), this Court affirmed a summary judgment rendered on the basis of the Statute of Limitations by the same District Judge as here, and held that a motion for summary judgment may be granted whenever the evidence adduced on the motion is such as would warrant a directed verdict. Consequently, since the evidence in the present case was of such a character as to warrant direction of a verdict, there was no genuine issue of fact, and it was appropriate for the court to grant the motion to dismiss or the motion for summary judgment on that basis, wholly without regard to any procedure for completing or effectuating the order granting a directed verdict as such.

Now, here, (1) it is clear that the District Court did in fact base its order of dismissal on the evidence upon which it had directed a verdict, the minute order granting the motion expressly so stating, and (2) it is also clear that it was proper for the court to do so. That evidence consisted entirely of testimony of appellant's chief executive and of documents written by appellant. In other words it consisted entirely of appellant's admissions; and those admissions—documentary and oral—were properly considered in support of the motion, under *R.C.P.*, Rule 56(c), which permits use of "pleadings, depositions and admissions" as well as affidavits, and under *R.C.P.*, Rule 43(e), which provides that,

"When a motion is based on facts not appearing of record, the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard orally, or partly on oral testimony or depositions."⁶

A motion to dismiss may be granted on evidence showing that there is no genuine issue of fact (see cases cited in foot-

6. *Moore's Federal Practice*, p. 3077 notes that this provision "will prove of service in hearing motions for summary judgment."

note 5 on page 5 of our main brief). Such a motion is in effect a motion for summary judgment, it being immaterial what nomenclature is used to describe it. The recent amendment to Rule 12(b) of the *Rules of Civil Procedure* expressly recognizes the right to rest a motion to dismiss on matters outside the pleadings, treating such a motion as equivalent to a motion for summary judgment. As stated in the notes of the Advisory Committee under Rule 12(b), this amendment really only defined the existing practice carefully. The only requirement is that the parties should be given a reasonable opportunity to present all pertinent material. Such opportunity, obviously, the appellant not only had but exercised.

The judgment may also be deemed correct as having been rendered on the motion for summary judgment for the reasons just expressed. Indeed, here the motion to dismiss and the motion for summary judgment were physically one and the same (see our main brief, p. 5). Although the court, before the trial on the Statute of Limitations had been directed, had entered an order denying the motion for summary judgment, in effect it vacated that order and granted the motion for summary judgment after appellant had been given every opportunity to show that there was a genuine issue of fact and had not only failed to do so but by numerous additional admissions, oral and documentary, had demonstrated that no such issue existed. The court had the power to act in this manner, since an order overruling or denying a motion to dismiss or for judgment is not a final order, and the court may always change its ruling. Cf. *De La Beckwith v. Superior Court*, 146 Cal. 496; *Howe v. Board of Supervisors*, 118 Cal. App. 306; *Bank of America v. Superior Court*, 20 Cal. 2d 697, 702; *Alameda v. The Paraffine Companies*, decided by this Court, July 8, 1948, No. 11,960.

In originally denying the motion for summary judgment the court had done so because it thought that "there might be lurking in the case some matter of weight of evidence" (R. 264),

or, as it put it when it granted the motion for the directed verdict, it had initially denied the motion for summary judgment "for the reason that there might be a factual question in some way necessary to be decided in connection with the plea of the Statute of Limitations" (R. 801), but it had now concluded that no genuine issue existed. These statements were, by express reference, made part of its order dismissing the action (see p. 19, *supra*).

CONCLUSION

It is respectfully submitted that the absence of a verdict is an irrelevant fact which should not interfere with disposition of the case on its merits, and that on the merits the judgment was clearly right and should be affirmed.

Dated: San Francisco, California, July 29, 1948.

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No. 11,766

United States
Circuit Court of Appeals

For the Ninth Circuit

BURNHAM CHEMICAL COMPANY,

Appellant,

VS.

BORAX CONSOLIDATED, LTD., ET AL.,

Appellees.

Memorandum of Appellant in Answer to the Reply
of Borax Consolidated to the Supplementary
Memorandum in Behalf of Appellant

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Memorandum of Appellant in Answer to the Reply
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INTRODUCTION

The Reply of Borax Consolidated, Ltd., et al. to our Supplementary Memorandum is beset with frailties. A vital weakness is that it lacks a frame of reference. It fails to relate the immediate issue with which it is concerned to the cause of action pending in the court below. It is scarcely less vital that it deals with law and equity as if they were separate things, that its citation of cases is governed by no rule of relevancy but wanders far from

antitrust, that the text of the Reply is largely a thing of shreds and patches made up of quotations in abstract language torn from their contexts and, in general, the argument is a mosaic of legalisms. It is an axiom that a holding must be read in the light of the concrete situation before the court. It is necessary, therefore, to recapture perspective and to view the detail of issues concerned with the application of a state statute of limitations within the setting of the specific case which is now in litigation.

ARGUMENT

I. THE ISSUES HERE ON APPEAL CAN BE UNDERSTOOD ONLY AGAINST THE BACKGROUND OF THE INSTANT CASE.

This is a suit by Burnham Chemical Company against several large corporations engaged in the borax business. The three principal defendants, Borax Consolidated, Ltd., and its subsidiary, the Pacific Coast Borax Company, and American Potash and Chemical Corporation, dominate the industry. The appellant alleges and is now prepared to prove that these companies have from the first date mentioned in the complaint been acting in concert, that a series of understandings was formalized into a basic agreement in 1929, that through this treaty these companies and their subsidiaries organized a cartel which has worldwide dominion over the production, transportation and marketing of borax and that over the years these companies acting in concert have consistently employed unfair and predatory practices to drive independents, including appellant Burnham, out of business.

The appellant, along with other independents, has been driven out of business. Being forced to the wall in 1929,

the record shows that it was skeptical of the genuineness of the competition between Borax Consolidated, Ltd., and American Potash and Chemical Corporation, which these companies professed, and that at times it came to believe that these two larger confederates, along with the Pacific Coast Borax Company and the United States Borax Company, had by a concerted and illegal course of conduct—alleged in detail in the complaint—forced the appellant out of business. But even though the Burnham Chemical Company at times may have believed that the professions of appellees were false and that their conspiracy was the source of its undoing, it was unable to secure evidence enough to frame a complaint which would stick in court.¹ A reading of this sentence in the margin is enough to indicate that Burnham was not and for many years could not be in possession of the facts essential to frame a complaint. It is true that once in court the procedures of interrogatory and discovery would be available. But the complaint had to survive a motion to dismiss before these weapons could be brought within Burnham's reach.

But Burnham did not sleep on his rights. It pursued its own investigations with diligence as far as its means would permit. When it became evident that the task was

(1) The minimum requisites for a complaint have been succinctly stated by Judge Parker in *Alexander Milburn Co. v. Union Carbide & Carbon Corp.*, 15 F.(2d) 678, 680 (cert. den. 273 U.S. 757). The Court said:

“For it is not sufficient that the declaration be framed in the words of the statute or that it allege mere conclusions of the pleader. It must describe with definiteness and certainty the combination or conspiracy relied upon, as well as the acts done which result in damage to plaintiff and in doing so must set forth the substance of the agreement in restraint of trade, or the plan or scheme of the conspiracy, or the facts constituting the attempt to monopolize.”

beyond its own resources it complained to the Department of Justice. But the conspiracy had been concealed with such skill and cunning that even the Department of Justice with all of its resources could not discover evidence sufficient to warrant an action at law. It was not until 1944 when the seizure of American Potash as an alien corporation gave the Government access to the files of the company, that the master agreement of 1929 was discovered. And with the series of clues presented there, the whole conspiracy was revealed. After the discovery of the facts of conspiracy and the plan of restraint, Burnham proceeded with diligence to frame and to file its cause of action.

In the record four things stand out sharply:

(1) Burnham was not guilty of laches and did not sleep on its rights;

(2) The whole scheme of deceit was fraudulently concealed for years;

(3) No amount of diligence on Burnham's part could have turned up the minimum of evidence necessary to sustain a cause of action, and

(4) Once the materials were put within reach, Burnham promptly filed its complaint in court.

Against this background, the procedures of the court below are to be reviewed and the issues in this proceeding are to be adjudged.

II. THE REPLY OF BORAX CONSOLIDATED, ET AL., IS BASED UPON PREMISES UTTERLY FOREIGN TO OUR SYSTEM OF LAW.

1. The Reply is written as if each issue in the case was to be resolved by reference to a fixed and invariable rule of law. A case—particularly an antitrust case—is a com-

plicated statement of fact. The course of conduct subject to legal challenge is engaged in by many actors, sometimes over a period of years. The lawfulness of the conduct is to be measured not by a single rule of law but by reference to all the law that is applicable. In a Sherman Act case there is always involved reference to the anti-trust laws, to the general law within which antitrust is set and to various state statutes. A rule of law may be compelling. Another may be useful as a guide. A third may throw light upon an issue. But the case must be decided in terms of all the law that is relevant.

2. The Reply eliminates from a case the function of judgment. It is written as if the application of the law to a controversy were mechanical. Rules are regarded as static things. Yet the genius of our law is its flexible character. This flexibility appears in the usage of trial by jury in leaving the issue to the reasonable man. It is written in large letters in the antitrust laws which from the days of *Standard Oil v. U. S.*, 221 U.S. 1, to *F.T.C. v. Cement Institute*, 68 S.Ct. 1335, have upheld the rule of reason. It is the very character of administrative law to have general provisions shaped to the circumstance of particular situations. In respect to our insular territories the laws of the United States are to be applied so far as they can be adapted to territorial need. The Constitution itself is written in terms which will take concrete meaning from changing circumstances.

3. The Reply degrades a private suit in antitrust to the status of a mere private controversy which concerns only the parties.

4. Under the antitrust laws the function of the private suit is alike to redress a private harm and to vindicate

the public interest. Although this matter has been set forth in some detail in our Supplementary Memorandum, it has been confused in the Reply. It is, therefore, necessary without repeating what has been said before, to straighten out the confusion. The appellees are quite wrong in insisting an antitrust suit is to be treated like any other private action.

Among the oldest and the best established of our rights is the liberty of a man to and within his trade. This liberty was recognized as a fundamental right as long ago as 1616. *Case of the Tailors of Ipswitch*, 77 Eng. Rep. 1218. The courts even refused to accept a royal grant of monopoly as a sanction for closing a trade against the newcomer. *Darcy v. Allen*, 77 Eng. Rep. 1260. The right has been recognized even against the act of the legislature in our own system of law. *Yick Wo v. Hopkins*, 65 S. Ct. 1064; *New State Ice Co. v. Liebmann*,

It is for these reasons that Mr. Chief Justice Hughes in *Appalachian Coals, Inc. v. U. S.*, 288 U.S. 344, 359, set it down that: "As a charter of freedom the act has a generality and adaptability comparable to that found to be desirable in constitutional provisions." The comparison is more than an analogue. It is a summary of interpretative judgments by the Supreme Court. As Mr. Justice Sutherland put it for the Supreme Court in *Puerto Rico v. Shell Oil Co.*, 302 U.S. 253, "The Congress meant to deal comprehensively with the subject of contracts, combinations and conspiracies in restraint of trade and to that end to exert all the power it possessed."

The idea that the public interest is to be protected through private litigation is in no sense novel. It is basic to our system of jurisprudence. In England it goes back

for centuries. In this country it is present from the foundation of the Republic. *Marvin v. Trout*, 26 S. Ct. 31, 34. It stems from the informer who in days of old was accorded his cause of action and allowed a substantial share of all the revenue he could collect for the government. With a change in usage, the informer now usually gives his information to an official of the government rather than suing in his own name. The usage, however, has survived in a derivative form. A person who has a cause of action of his own is made an instrument of police. Thus, in tort the usage of exemplary and punitive damage is established. The plaintiff in his own right is entitled to be made whole. The double or triple penalty is assessed to punish the wrongdoer and to prevent future offenses.

The Sherman Act as passed by the Fiftieth Congress is not a new statute. It was deliberately written in the language of the common law action against restraint of trade. The fact that the injured party if he makes out his case is entitled to recover three times the amount of his damage is in accord alike with the common law against restraints. The triple damage action goes back at least as far as the Statute of Monopolies, 21 Jac. 1, Ch. 3 (1623, 1624). It is of note that the private action can be brought for a violation of any section of the antitrust laws. The substantive law involved in the private action is the substantive law which is invoked when the government institutes a criminal suit or resorts to an equity proceeding. The private action, far older than the Sherman Act, is the original instrument depended upon to police the common law against restraints. The novelty of the act does not lie in the triple damage suit. It lies in the sanction for a criminal action and in the formalization of resort to

equity. The private suit is allowed to prevent violation of the very loss for which there is resort to criminal or equitable action.

As the authorities quoted in our Supplemental Memorandum show, the very purpose of the triple damage provision is to supplement in every way the activities of the government in the enforcement of the antitrust laws. The theory of the triple damage action is that the defendant should suffer a penalty because he has committed a crime. The act was written in the full knowledge of the fact that the government would not be able to reach a large number of violations of the statutes and that, therefore, each injured party was made and constituted a kind of private policeman. The triple damage feature of the Act has nothing to do with compensating the wronged party for the injuries suffered. It is in effect an interim proceeding to deter other people from violating the Act and in this respect it has precisely the same purpose as a criminal penalty. A dominant purpose alike of the old common law rule against restraints and of the modern antitrust acts is to lighten the burden upon the government in enforcing the antitrust laws and of enlisting private parties in the business of law enforcement. This is indicated by Section 5 of the Clayton Act which relates private rights to public litigation. This section aims at three distinct purposes: (1) It suspends the running of any statute of limitations while the government is pushing forward litigation concerned with the same matter; (2) it makes the findings of fact in suits brought by the government *prima facie* evidence in private suits, and (3) it imposes upon governmental agencies the function of conducting inquiries necessary to reveal the facts upon

which private antitrust suits can be based. The last function is of particular consequence because the discovery of evidence necessary to win a suit or even to write a complaint is as often as not beyond the resources of the private party.

The law of recourse to the courts is quite plain. It is true, as appellees claim, that a party cannot file suit in an antitrust case unless he himself is injured. But none of the authorities cited in the Reply Brief is to the effect that his suit once it is in court must be so limited. As here, the harm to the individual is in the usual case a mere incident to the unfolding of the conspiracy. The conspiracy as an entity cannot be understood from the vantage point of the private interest which is wronged. As Mr. Justice Black pointed out in the *Cement* case, an understanding of the wrong involves the picture and the background of the whole conspiracy. Nor is it true that the relief sought by the private party is limited to recompense for the wrong. In the private damage suit it is of note that he collects not a sum sufficient to make him whole but three times that amount. In the case in equity the private harm may be so inseparably associated with the wrong to the public that relief to the private party involves a general relief of which the public is the beneficiary.

The use of a private suit to instrument public policy finds a natural field in antitrust. It is of note that of late this old and established device has been pushed into a new legal domain. Administrative law is in general statutory law and as a consequence the right of the individual to his cause of action—when the end is to give effect to a public policy—rests upon legislation. So, in general, per-

sons authorized to bring such suits—and only such persons—are permitted this resort to court to assert the public interest. And it is natural that the interest is set up as the criterion of the right to sue. In a penetrating opinion in which the whole matter is passed in critical review, Judge Jerome Frank generalizes the requirements of a number of statutes into “some substantive, private, legally-protected interest.” *Associated Industries v. Ickes*, 134 F. (2d) 694. But the real question is whether the requisite interest is “substantive” or “legally-protected,” not in general but for the express purpose of instituting such a suit. In this excursion into administrative law it has been easy for the courts to pass from direct to secondary or derivative interests. The derivative suit by which the stockholder sues in the name of and as if he were the corporation stems from ancient lineage. In recent years a dual form of action in which the party plaintiff has some interest, however remote or nebulous to assert, and yet the real justification for the action is an opportunity to assert the public interest, has become quite prevalent. Thus a legally recognized injury, as well as an actual personal harm, is enough to sustain a cause of action. *Alabama Power Co. v. Ickes*, 302 U.S. 464. And in *F.C.C. v. Sanders Radio Corp.*, 60 S.Ct. 653, it was admitted that Sanders enjoyed no legal immunity from competition. Yet it was held that the issue presented by the grant of a license to a competitor made him an aggrieved party in the words of the statute. Although the right recognized was not sufficient to warrant his suit for an injunction, the public interest in the grant of the radio license made up the deficit—at least to the point where a judicial inquiry could be touched off and in *Scripps-How-*

ard Radio, Inc. v. F.C.C., 62 S.Ct. 875, the somewhat vagrant lines of the case just mentioned are drawn tight. Courts no less than administrative bodies are "agencies of government." The right of appeal from the decision of the agency to persons aggrieved is not to be limited to the severities of substantive law. "These private litigants have standing only as representatives of the public interest." And, quoting from *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, "the court can go much further in the public interest than when only private interests are involved." Thus the theory that private suits are to be used to police public policy not only goes back to the beginnings of our system of law, but currently finds expression in widely scattered fields in which the public interest is involved.

The bother about the argument in the Reply Brief is that it puts the question in the wrong way. There is no question of whether private rights are enlarged by the plea of the public interest or whether the private defenses are thereby restricted. Here, as in other branches of the law, the rights of the plaintiff and the pleas of the defendants are fixed by the character of the action. Here the very purpose of the suit is to police a public policy. The antitrust laws would lose their effect if in their administration judicial procedure had to stop short of the function to be performed.

III. THE ANTITRUST ACTS ARE DECLARATORY OF PUBLIC POLICY AND IN THEIR JUDICIAL ADMINISTRATION THE SUBSTANTIVE RIGHTS WHICH THEY CONFER ARE NOT TO BE DEFEATED BY THE REGID APPLICATION OF STATUTES AND PROCEDURES INTENDED TO INSTRUMENT THEM.

A disposition of the issue before the court is dependent upon a clear-cut understanding of the place of the statute of limitation in the administration of the antitrust laws. The Sherman Act announces our dominant public policy for the national economy. It confers upon individuals the liberties of their trades and guarantees their right to the free and open market. It insures to the public the protections of a competitive system in action. The rights which it establishes are among the liberties guarded against the government itself. They are guaranteed by federal law. In the judicial administration of the antitrust acts a great many devices and procedures must be employed. These devices and procedures are of an instrumental character. They are intended as aids to help towards the realization of the objectives of the antitrust acts. They are not intended to be barriers against the realization by individuals of rights guaranteed to them by federal law. The Sherman Act itself sets down no statute of limitations. It does not even say that the state statutes are to be employed. In the silence of Congress "the limitations of time for commencing actions under national legislation" has been left to judicial implication. As to actions of law, the silence of Congress has been interpreted to mean that it is a federal policy to use at least as a guiding principle the local law of limitations.

The current trend of judicial decision runs strongly against allowing the policies manifest in federal statutes

to be defeated by a rigid application of state rules invoked to instrument judicial administration.

The federal courts of late have been increasingly aware that federal statutes are expressions of public policy; that it is only in the light of its intent and objectives that an Act of Congress can be understood, and its declared policy is to be the guide to its judicial administration. This trend is manifest in decisions concerned with a wide variety of procedural devices, which are employed in reaching judgments on substantive issues.

See *Holmberg v. Ambrecht*, 66 S.Ct. 582, 584. Thus it is implied that state statutes of limitations are to be absorbed "within the interstices of the federal enactments." It is thus only by implication that state statutes of limitations are brought in. It is of note that in the generality of antitrust cases no mention is made of a statute of limitation.

There is in federal law no command that the courts shall follow state statutes on limitations. Federal rights are of a most diverse character, running all the way from claims under a contract to suits for being put out of business by a conspiracy. They run the whole gauntlet of causes of action under the law and are most diverse in kind. Some states lump all of these together and set against them a single period of time within which a suit must be begun. Others allow cases seeking to vindicate federal rights to be established as best they can upon state statutes. For this purpose the state statutes are far from ideal instruments of judicial administration. In most states—California is in point—there is no special provision for anti-trust actions. The usual state act resolves causes of action into a number of categories and sets a time period against

each of these. The categories have been framed by state legislatures with state and local laws primarily in mind. Almost none of them contain a category into which a private action for antitrust can easily fall. In most of them an antitrust suit will fall as neatly or as clumsily into one category as well as into another. It is quite proper to insist that the state law may furnish guidance to the court in determining antitrust issues. It is unwarranted to say that acts never intended to serve such a purpose must be rigidly followed. The substantive provisions of the antitrust law have long been governed by the rule of reason. It is absurd to say that this rule of reason must be abandoned on the administrative level.

It is of note that these statutes are so diverse in character as seriously to affect the federal rights which they are intended to secure. The periods within which suits must be brought vary greatly from state to state. They may also vary within the same state according to the category in which an antitrust action is put by the court. A number of men may have exactly the same rights under the substantive law of antitrust. These rights, however, may mean quite different things as they are affected by the different statutes of limitations of the several states. The case of *Momand v. Universal Film Exchange*, 43 Fed. Supp. 996, is here in point. The plaintiff in that case, a citizen of West Virginia, brought his suit in Massachusetts. The Massachusetts law decrees the period fixed by the statute of limitation of the state in which the plaintiff has his domicile. In this case the plaintiff not only had a shorter period in which to bring his suit but what that period was depended upon a number of provisions in the West Virginia statutes. Judge Wyzanski with meticulous

care tried to determine exactly which statute of limitation was correct. He undoubtedly did justice in the instant case, but the result is the greatest diversity in respect to the rights of citizens depending upon their places of residence and the state in which they bring suit. Such a diversity is a denial of equal justice before the law and was never intended by the antitrust acts.

The statute of limitation must be appraised in terms of its instrumental purpose. It is intended to insure fairness to the defendant by seeing to it that any complaint against him is brought within a reasonable time. It is intended to insure justice by securing a trial while memories are fresh, while facts are in hand and while documents are available. The statute of limitation is intended to prevent the plaintiff from sleeping on his rights and to insure that his cause of action is brought while it is timely. A literal application of the statute for which the appellees contend would deny and defeat the very purpose of the statute of limitation. If the action had to be started within three years after the last overt act, it might have to be brought into court before plaintiffs had acquired knowledge of the conspiracy. Before the pattern of restraint could have been discovered and before any of the pertinent documents were available. In that case it would have insured a trial at a time when the plaintiff had no opportunity to make out his case. As set forth in detail in the complaint, the appellees held themselves out to be engaged in a competitive game. As the complaint alleges, the game was crooked and the cards were stacked. This would amount to a travesty upon the law. In view of all this, there are three quite distinct ways in which the court may look at the matter. It is of interest that all

three lead to the same result: (1) the court may hold that since the federal law is an expression of public policy the objectives of antitrust must be realized. To that end the statutes of limitations must be recognized as instrumental. They can, therefore, be used for guidance, but must not be allowed to subvert the ends of justice; (2) the court can hold that the defendants have in the series of frauds recited in the complaint and in the fraudulent concealment of those frauds been guilty of unethical conduct. It is to be remembered that the statute of limitation is technically a plea to be put forward by the defense. To be properly put forward not only must the statute be pleaded but a case must be made out for its application. In other words, it must be shown that it protects the defendants against negligence on the part of the plaintiff and against an untimely assertion of charges. In the instant case the statute of limitation will not stand critical examination in terms of the defense for which it is intended. In more extreme form, it can be argued that because of their unethical conduct and their inability to come into court with clean hands, the plaintiffs are estopped from such a plea; (3) the court may rule that it is proper in this case to apply the appropriate California statute and that the appropriate statute is that which states that when there is fraud and fraudulent concealment the time shall begin to run from the date of discovery.

Any one of these three alternatives will lead to the same result.

IV. FRAUD IS HERE PRESENT.

Appellees seek an escape from having to answer by insisting that the course of their conduct as recited by the Complaint does not constitute fraud and that in respect to it there has been no fraudulent concealment. They argue that for the more liberal section of the statute of limitation to apply the fraud must be "the gravamen of the offense" and that the law holds that an antitrust suit for triple damage is not bottomed in fraud. In support of this contention they rely upon the single case of *Foster and Kleiser v. Special Site Sign Co.*, 85 F. (2d) 742. The case gives no support to that contention. In the court below there had been a complete trial; and, on the basis of the record, the court on review stated that it had failed to discover evidence of fraud.

The contention runs directly contrary to the facts. The suit for triple damage is a suit for a wrong. In the instant case—as with its kind—the wrong is done to a man's business. Unlike the ordinary wrong it may not involve personal malice; the intent is to seek a competitive advantage for one's self or to impose a disadvantage on a competitor. The animus which prompts the wrong has been referred to by Mr. Justice Holmes as "disinterested malevolence." A person—whether natural or corporate—may be injured in his business by any one of a number of wrongs. A conspiracy is an instrument, neither good nor bad in itself; its legal quality depends upon its intent and the use to which it is put. There can be a conspiracy to feed the hungry, to corrupt youth, to blackmail the rich and innocent, to save souls. In antitrust the conspiracy is usually directed, by the commission of a wrong or a series of wrongs, to restrain trade or to secure a monopoly. The

gravamen of the offense lies not alone in the conspiracy, but also in the wrong, as the defendants have admitted. Note their insistence upon each injury as occasion for a separate cause of action. And the business harm can take any one of a number of forms. The instances of pure negligence are rare. Slander and libel are at common law "unfair trade practices" and have come under the condemnation of Section 5 of the Federal Trade Commission Act. A conspiracy in restraint of trade is not infrequently a trespass on the other fellow's business. Once an overt and avowed attempt to put a competitor out of business—as in the old fashioned tactics recited in the *Foster and Kleiser case*—was the dominant form of business wrong. Fraud is a common form; with the better enforcement of the antitrust laws, it has come into the ascendancy as the dominant form of business wrong.

It seems unnecessary to burden this memorandum with so elementary a discussion. Its application to the instant case is self-evident. The right of a man to, and within, his trade is a fundamental liberty. The Sherman Act makes it the law of the land that there shall be no ganging up by members of an industry against one of their kind. The Clayton and the Federal Trade Commission acts decree a plane of fair competition and forbid unfair competitive practices. The defendants have ganged up against Burnham and other independents. They have entered into an elaborate scheme, by the use of unfair, deceptive, fraudulent practices to drive Burnham to the wall. All the time they have represented themselves as conducting their business in a fair and lawful way. From long before 1929, when a series of understandings was formalized until 1944, they have succeeded in concealing their

fraudulent scheme from their competitors, the general public and the government. Under the statutes prohibiting the use of the mails to defraud, there have been hundreds of convictions for fraud. The offenses revealed there are petty compared with the gigantic design of Borax Consolidated and American Potash to defraud small companies not only of their business but of the very opportunity to engage in business. The defendants made out of the marketing of borax a crooked game while holding themselves out to be honest business concerns operating according to law. The offense charged in the Complaint belongs at the very top of the hierarchy of frauds.

V. THE CASES RELIED UPON BY APPELLEES ARE NOT IN POINT.

A word in respect to the cases cited by the Appellees is in order. It is perhaps enough to say that this code of usage in respect to citation is distinctive. It has no place for a recitation of the facts of the case, for an exact statement of the issue before the court, for the concrete situation to which the holding applies, or for the limits which the court imposes on its own language. Instead cases are cited which only in the vaguest way or not at all concern antitrust; dicta in abstract language are wrenched from context; and fragments, woven together into mosaics, are driven as inert declarations towards appointed goals. A number of examples are given elsewhere in this memorandum. It is necessary to bother the court with only a few representative samples to exhibit the character of the whole performance.

1. The case of *Mercoild Corporation v. Midcontinent Investment Co.*, 320 U.S. 661, is cited on pp. 2 and 15 of

the Reply. On p. 2 it is employed to pick up the cited case of *Fleitmann v. Welsbach Street Lighting Co.*, 240 U.S. 27, in which Mr. Justice Holmes rules that a private anti-trust suit is an action at law. That proposition is neither doubted nor is it in issue in this case. Note that the ruling is not from the *Mercoïd case*. On pp. 15-16, the *Mercoïd case* is cited for the fact that Mercoïd was allowed to bring its counter-claim for triple damage. The statement that the counter-claim was disposed of "under settled rules applicable to private litigation" just isn't so.

2. In the Reply a long passage is recited from *Campbell v. Haverhill*, 155 U.S. 610, to the effect that neither the privileges of the plaintiff should be enlarged nor the pleas of the defendants restricted. Even the passage itself makes it clear that the ruling is limited to a patent infringement suit. In such a case—the reverse of the anti-trust suit—the plaintiff is asserting a privilege and public interest lies on the side of the defendant. For, if the validity of the patent is upheld, an exclusive right to make use and vend will be vested in the plaintiff, while if it is declared invalid the so-called invention will pass into the public domain.

3. In *Hazel Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 338, the court's decision is in the Reply, p. 16, superseded by a short gloss upon a single passage in that decision. That gloss is a line in *Briggs v. Pennsylvania Ry. Co.*, 333 U.S. 92, to the effect that "power to act on the mandate after the term expires survives to protect the integrity of the court's own process." True, but the fraud against the court was secondary and derivative, and the opinion of the court in the *Hazel Atlas case* makes it clear that it was acting to guard the public interest.

4. The case of *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 742 comes nowhere near supporting the proposition for which it is cited. As set down elsewhere, the decision holds that the record discloses no fraud on the part of the defendant. It is cited to hold that an antitrust action does not sound in tort.

5. In *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, suit was brought because of the excessive price of iron products by reason of a gang-up among the sellers. A federal statute of limitation of five years, concerned with penalties and forfeitures, was rejected. A Tennessee statute of 1 year was rejected in favor of a 10 year statute. The court, through Mr. Justice Holmes, chose among alternative states and allowed to the plaintiff that most favorable to its cause. None of this is stated in the citation.

6. The case of *Glenn Coal Co. v. Dickenson Fuel Co.*, 72 F. (2d) 885, is correctly cited for the propositions that "to receive the plaintiff" in a triple damage action must establish both a violation of the law and his own damage. But this is no authority for saying that in such an action he does not represent the public, that he is limited to so much of the conspiracy as results in his own injury, or that the court is limited in its relief to recompensing him for his own damage. The case correctly supports elementary laws; it gives no support to the attempt to rebut the propositions in our Supplemental Memorandum.

7. The reply, p. 11, attempts to answer our citation of *Mid-West Theatres Co. v. Co-Operative Theatres*, 43 F. Supp. 216, to the effect that "where, in a private controversy there are questions which may seriously affect public interest, the ordinary rules of evidence need not

always be followed," by a passage from the same case that for a cause of action the "plaintiff cannot rely upon a showing of wrongs to others." Granted; he can get into court only by alleging his own injury. The triple damage action is for a party which has an interest of its own, not for the busy-body. The question is what he can do when once he is in court.

The examples just discussed give a representative, but far from complete exhibition of the distinctive usage of the Appellees in the citation of cases. It would be as tiresome, as it is unnecessary, to continue the catalogue.

Reply of Appellant Relative to the Absence of a Formal Verdict

On the 30th day of July, 1948, appellant received the reply of appellees to the Supplemental Memorandum of Appellant. Coupled with this reply was a "Memorandum Relative to the Absence of a Formal Verdict," and having to do with the order of this Court directing the Clerk of the District Court to transmit a supplemental record containing the verdict or certifying that there was none.

Pursuant to such Order the Clerk of the District Court under date of July 23, 1948 filed with this Court a "Supplemental Record on Appeal," in which it was certified that "no verdict was filed in the above entitled case." Subsequently thereto, and on August 5, 1948 and without the order of this Court, the Clerk of the District Court filed herein a document entitled, "Supplemental Record on Appeal," in which it was stated:

"I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, in pursuance of the order of the United States Cir-

cuit Court of Appeals for the Ninth Circuit filed on July 21, 1948, do hereby certify that no written verdict was filed in the above entitled case.

“I further certify that the following minute order was entered in the above entitled case on April 3, 1947:

‘The parties hereto and the jury heretofore impaneled herein being present as heretofore, the further trial of this case was resumed. The Court having taken under advisement the respective motions of the plaintiff and the defendants for a directed verdict in favor of the plaintiff and the defendants, respectively, and due consideration having been had thereon, it is Ordered that plaintiff’s motion for a directed verdict be denied and the defendants’ Motion for a directed verdict be granted. It is further Ordered as to the special issue to be submitted to the jury, to-wit: “At any time from May 17, 1929 to October 10, 1939 did plaintiff know or have good cause to believe that its business had been theretofore damaged by acts of the defendants in violation of the Anti-Trust laws of the United States?”, that a directed verdict of “Yes” be recorded, and the jury was thereupon excused from further deliberations herein. Mr. Harrison thereupon renewed his motion to dismiss the cause herein on behalf of the defendants, and submitted Defendants’ Special Exhibits A and B in support of said motion. After hearing Mr. Carr and Mr. Harrison, it is ordered that plaintiff have fifteen days to file an additional memorandum in connection with said motion, and that defendants have fifteen days to reply. The case was thereupon continued to May 5, 1947, for submission of the motion to dismiss.’

“In Witness Whereof I have hereunto affixed my hand and the seal of said District Court this 5th day of August, A.D. 1948.

C. W. CALBREATH, Clerk,
By C. M. TAYLOR,
Deputy Clerk.”

No reference to any such Minute Order was made in the first Supplemental Record on Appeal. An examination of the Record, on page 196, shows therein an order denying plaintiff's motion for a directed verdict and order granting defendant's motion for a directed verdict. This is denominated the Minute Order of April 3, 1947, but such Record does not include all of the Minute Order set forth in the second “Supplemental Record on Appeal” and filed herein. It will be noted that the printed Record, at page 196, only includes the first two sentences of the Minute Order as set forth in the Supplemental Record filed herein on August 5, 1948.

What actually happened is shown by the Record itself as hereinafter set forth.

On pages 18 and 19 of Memorandum, counsel presume to set forth what they designate as “the pertinent facts.” Some of these are correct and others far afield. The following is what really happened:

When the motions for a directed verdict were made at the conclusions of the trial, the Court engaged in a colloquy with counsel, which is reported on pages 800 to 819 (T. R.). Upon the granting of appellees' motion, the following occurred (805 R.):

“Ladies and gentlemen, *the decision which the court has just made will excuse the jury from any further consideration of the case.* It sometimes happens that

even though a jury has sat for a long time in hearing evidence in a case, as in this unusual case, it becomes necessary as a matter of law for the court to make a decision which takes the case from the hands of the jury. Therefore, because of the fact that the court has directed the decision in this matter, *it will not be necessary for the jury to make any decision in the case.* I wish to thank the members of this jury for their attention and attendance upon the trial of this case, and to assure the jury, *even though you have not been called upon to make a decision in the case* you have nevertheless by your attendance in the case made your proper contribution as to this case. *The jury may be excused at this time.* (Underscoring ours.)

“Mr. Carr: At this time may the plaintiff except to the denial of its motion? Your Honor has ordered a denial of its motion for a directed verdict. I also except to the order of Your Honor granting the motion of the defendants for a directed verdict.

“The Court: Very well. The record will so show.

“**Mr. Harrison: I assume, Your Honor, no formal verdict is necessary?**

“The Court: I do not think so. The jury may be excused.

(Thereupon the jury were excused and retired from the courtroom.)

“The Court: Inasmuch as the court has directed the verdict in this matter, Mr. Carr, I would like to ask you whether or not, before the court passes upon the motion to dismiss on the ground that the action is barred by the statute of limitations, if you wish to have an opportunity to present any other ground in opposition to the granting of the motion.

“Mr. Carr: I do, Your Honor, upon the ground of a continuing conspiracy.”

From the above quotation of the Record it is manifest that the motion for a directed verdict was granted and *the jury discharged* prior to the entry of any such Minute Order as appears in the second Supplemental Record on Appeal filed herein on August 5, 1948, and that the verdict purported to have been entered was that of the Court and not of the jury. The Record definitely shows that no verdict was ever rendered by the jury.

Following the above statement counsel for appellant stated that he wished to present the question of a continuing conspiracy which was an entirely different point to that presented on the motion for a directed verdict. It was possible that the jury could find that appellant had discovered the existence of the conspiracy and yet such conspiracy be a continuing conspiracy on which the statute did not begin to run until the performance of the last overt act. Finally, the Court granted permission to counsel for appellant to present this particular point in a separate memorandum. This question was briefed and subsequently, and on May 5, 1947, the Court made an order granting the motions to dismiss. Such order is as follows (R. p. 199):

“ORDER GRANTING MOTIONS TO DISMISS”

“For the reasons stated by the Court in directing a verdict upon the factual issues upon which the defense of the Statute of Limitations was based, defendants’ motions to dismiss are severally granted and the cause is dismissed with costs to defendants.

“Dated: May 5, 1947.

LOUIS E. GOODMAN,

United States District Court.

[Endorsed]: Filed May 6, 1947.”

Subsequently, and on May 9, 1947, the judgment in question was signed and filed (R. 199).

The factual question presented to the jury and the question of the continuing conspiracy were two separate and distinct questions.

Counsel state (Memo pages 19, 25 and 27) that appellant made no objections to the absence of a formal verdict, and go still further to say that the judgment and its recital *were approved as to form* as provided in local Rule 5(d), attempting thereby to lead the Court to the belief that counsel for appellant approved the substance of the judgment. Such is not the law or the fact, and of this counsel are well aware, and is but another illustration of their attempt to lead the Court astray. Local Rule 5(d) provides: "Such indorsement (as to form) shall not affect the rights of any party, but shall be considered only as an indication to the Judge that the *form* is correct." No approval of the substance of the judgment or of the judgment itself was made. It was not necessary for appellant to except to the statement of the Court that it did not think it was necessary to secure a formal verdict. In fact, *there was no verdict*, and what the Court actually did was to take the case from the Jury, after granting appellee's motion, and then decide and dismiss the case. (Counsel for appellant had excepted to the granting of the motion for a directed verdict (R. p. 806).) **There was neither a verdict of the Jury nor a finding of fact or conclusion of law, and without the support of one or the other the judgment cannot stand (Rule 52-a). Inasmuch as the Court took the case from the Jury, it was the duty of the Court to make findings of fact and conclusions of law. This is**

not the ordinary case of where the Court instructs the Jury and the Jury returns a verdict in accordance with such instructions; here, the Court took the case from the Jury and decided it exactly as though no Jury had ever been called. Such action on the part of the Court required findings of fact and conclusions of law (Rule 52-a). The failure to do so leaves the judgment without support.

On page 19 of the Memorandum counsel also state that in the statement of points relied upon by appellant no objection was made of the failure to have a verdict returned.

On November 18, 1947 appellant filed its statement of points in this Court (R. 820-821). In such statement it adopted the statement previously filed by it in the District Court and dated August 2, 1947. Turning to such statement (R. pp. 216-19), we find the following:

“1. The District Court erred in granting upon May 6, 1947, defendants and appellees’ motion to dismiss the above-entitled cause.”

We submit that such point was sufficient to raise the question here involved as to the lack of verdict. Point 2 in the same statement refers to the error in rendering judgment in this case, and Point 6 alleges that the Court erred in denying upon April 21, 1947, plaintiff and appellant’s motions for a directed verdict and for a new trial on the question of the statute of limitations. Likewise, the following from the Notice of Appeal (R. p. 215) designates the orders appealed from, viz.:

“(a) The order made and entered in the above-entitled action on the 6th day of May, 1947, granting the motion of defendants and appellees herein to dismiss the above-entitled action;

And further from—

(b) The judgment entered by the above-entitled Court in the above-entitled action on the 8th day of May, 1947.

Dated: August 2nd, 1947.”

From the above we respectfully submit that the question presently at issue, namely the effect of the absence of a verdict, is properly before this Court. Counsel's suggestion that appellant waived this error on the part of the Court is entirely refuted in our Opening Brief. See bottom of page 29 and top of page 30, wherein authorities are cited to the effect that the method adopted by the lower Court was error.

And particularly see—

Fratta v. Grace Line, 139 F. (2d) 743 (2nd Cir.)

where, on page 744, the court stated:

“We take this occasion to suggest to trial judges that, generally speaking—although there may be exceptions—it is desirable not to direct a verdict at the close of the evidence, but to reserve decision on any motion therefor and allow the jury to bring in a verdict; the trial judge may then, if he thinks it improper, set aside the verdict as against the weight of the evidence and grant the motion, Federal Rules of Civil Procedure, rule 50(b), 28 U.S.C.A. following section 723c, with the consequence that if, on appeal, we disagree with him, we will be in a position to reinstate the verdict, thus avoiding the waste and expense of another trial.”

To the same general effect see—

Butte Copper & Zinc Co. v. Amerman, 157 F. (2d) 457, (9th Cir.)

In 64 *C.J.*, page 1053, it is said:

“In the absence of a statute to the contrary, *a verdict is a decision by a jury, and a finding by a judge is not a verdict*, but can only be expressed by an order or judgment.” (underscoring ours).

Likewise, in 53 *Am. Jur.*, page 695, Sec. 1005, it is said:

“A verdict is the final decision of a jury concerning matters of fact submitted to it by the court for determination. Indeed, in a strict sense *only a jury can render a verdict*, and the term does not include findings by a court.” (underscoring ours).

In *McCullough v. Allen*, 10 Kan. 120 (1872), it is said:

“The word verdict, as it is used in the law, is not applicable to the findings of fact by the court.”

Likewise, in *McHinter v. Warren*, 218 Mass. 310, 105 N.E. 990, where it was held that a verdict can be rendered only by a jury. This case was cited with approval in—

Fisher v. Drew, 141 N.E. 875.

On page 20 of their Memorandum counsel refer to Rule 50(b) to substantiate the action of the Court. An examination of such rule shows that it only has application *when the motion for a directed verdict is denied*. Here, the motion was granted. So, all of the words, words, and words presented by counsel on this point remain nothing but words. The authorities cited by counsel were either of stipulated judgment or error in denying the motion for a directed verdict or situations existing prior to the adoption of the present rules. Rule 46 is quoted but even under the exception within which counsel attempt to bring this

case no exception was necessary to the order of the Court granting counsel's motion.

Re: C. page 27 of counsel's Memorandum: In view of the fact that there were two motions—that is, one for summary judgment and one for dismissal, and the further fact that the motion for summary judgment was *denied*, the contention made in such subdivision C is untenable, for each motion stood on its own and was ruled on separately. That for summary judgment was denied. The failure to secure a verdict cannot now be used to reverse such order denying the motion for summary judgment; that is exactly what counsel now claim (p. 18 Memo). To permit such interpretation would be the making of a new judgment. The judgment recites the return of a verdict (which was an erroneous statement), the denial of the motion for a new trial and the granting of the motion to dismiss. No reference is made to the ruling on the motion for summary judgment and no appeal from that order was taken by appellees.

Furthermore, none of the evidence adduced by appellees was applicable to the cause of action charged upon, namely, the 1929 conspiracy; notwithstanding the Court absolutely ignored the real cause of action charged upon and allowed counsel to persuade it to wander off into a consideration of the evidence surrounding the *overt acts* set forth in the complaint. A dismissal based on such evidence was pure error.

We respectfully submit that the Court erred in taking the case from the Jury and not permitting it to render a verdict.

We also respectfully submit that appellant should have the relief prayed for in its Opening and Reply Brief filed herein.

August 18, 1948.

Respectfully submitted,

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No. 11,766

IN THE

United States
Court of Appeals

For the Ninth Circuit

BURNHAM CHEMICAL COMPANY, a corporation,
Appellant,

vs.

BORAX CONSOLIDATED, LTD., a corporation,
PACIFIC COAST BORAX COMPANY, a corporation, UNITED STATES BORAX COMPANY, a corporation, STERLING BORAX COMPANY, a corporation, and AMERICAN POTASH & CHEMICAL CORPORATION,
Appellees.

PETITION FOR REHEARING

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No. 11,766

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For the Ninth Circuit

BURNHAM CHEMICAL COMPANY, a corporation,

Appellant,

vs.

BORAX CONSOLIDATED, LTD., a corporation,
PACIFIC COAST BORAX COMPANY, a corporation,
UNITED STATES BORAX COMPANY, a corporation,
STERLING BORAX COMPANY, a corporation, and AMERICAN
POTASH & CHEMICAL CORPORATION,

Appellees.

PETITION FOR REHEARING

Appellant above named respectfully applies to this Court for a rehearing of the above entitled cause, upon the following grounds:

Premise

These defendants stand before the Court as admitted wrongdoers. They admit the allegations of the conspiracies culminating in that of 1929 and as alleged in the complaint, and further admit that the purpose of the same

was to destroy plaintiff financially. They admit their activities pursuant to such conspiracy of 1929 through the years from its formation until September 1, 1944 when the mandamus action against the Secretary of the Interior was filed in Washington, D. C., and involving the Little Placer activities. See paragraphs 57 to 81, inclusive, of the complaint (Tr. pp. 28 to 54, incl.), alleging the formation of the conspiracies and activities of defendants pursuant thereto. These paragraphs are all admitted with the exception of paragraph 75 (Tr. p. 190). Defendants attempt to escape such admissions and wrongs by pleading the Statute of Limitations.

Since when has Time turned Wrong into Right? Since when have the Courts of this land ceased to be guardians of the weak against the crookedness of the strong and placed their stamp of approval on such conduct and such wrongs? Yet, this Court has permitted such defendants to turn the Statute of Limitations from a Statute of Repose into a Statute of Escape.

The viciousness and intent to destroy born of the conspiracies charged have been carried clear through the years until the admission by defendants of their wrongdoing in the actions brought by the Government in 1944.

The formation of the conspiracies as alleged in the Complaint and the activities of defendants thereunder were all frauds and wrongs inflicted upon plaintiff and its approximately 7000 stockholders (Tr. p. 356). Such frauds were concealed during all of such years. This is conclusively shown by the fact that even in the face of Mr. Burnham's constant inquiries at the doors of various governmental departments it was not until 1944 that the Government,

with all of its power, was able to find evidence of such conspiracies sufficient to enable action on its part.

If there ever was a case in which the equitable doctrine of *Holmberg v. Armbrrecht* (327 U.S. 392) should be applied, it is the one before Your Honors. To refuse to do so is an award to defendants for their wrongdoing and an approval of the damages which they caused plaintiff to suffer.

We submit that this Court decided this case without a consideration of the foregoing facts and, therefore, a rehearing should be granted.

I.

THIS COURT ERRED IN HOLDING:

- (1) **"Where (as Here) a Private Suitor Asserts a Claim Under the Sherman Act for Damages, the Gravamen of the Complaint Is Not the Conspiracy."** (Page 3 pamphlet opinion)

This holding is contrary to the rule as laid down by the Supreme Court which holds that the gravamen of the complaint IS the conspiracy. And

- (2) **"We Hold That This Is an Action at Law for Damages Under Federal Antitrust Laws and the Only Damages for Which a Recovery Might Be Had Are Those which Accrued and Were Suffered Within Three Years Prior to the Filing of the Complaint and the Record Reveals That None Were Shown During This Period. The Court Therefore Properly Held the Cause Barred by Section 338(1) of the California Statute of Limitations."** (Pages 15-16 pamphlet opinion)

Such statements eliminate the equitable principles urged by appellant but discarded by this Court, so under this heading we will discuss the point at issue purely from the

law side, leaving for future presentation herein the error which we believe occurred in the elimination by this Court of the equitable question.

But, we also contend that even from the law side, such portion of the opinion is contrary to the law as laid down by the Supreme Court. It is a misconception of the antitrust law and makes the question of *damages* rather than *conspiracy* the point at issue and the gravamen of the cause of action. Section 15 of Title 15 U.S.C.A. (quoted below) is the provision creating this right in individuals and giving to the injured party his *cause of action*.

“Any person who shall be injured in his business or property *by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.*”

The words “by reason of anything forbidden in the antitrust laws” relate back to Sections 1 and 2, T. 15, which set forth the forbidden acts, among which is the conspiring to restrain trade and the conspiring to monopolize or attempt to monopolize. The present complaint is based both upon a conspiracy to restrain trade and also a conspiracy to monopolize or attempt to monopolize. It is therefore the *conspiracy* formed by these appellees to injure appellant that is the gravamen of the action, not the damages resulting from such conspiracy. Congress definitely and conclusively created a new right and cause of action, a direct action upon the conspiracy itself. This,

Congress had the right to do, as definitely decided in the antitrust case of

Chattanooga Foundry etc. v. Atlanta, 203 U.S. 390;
51 L.ed. 241,

where it was stated at the bottom of p. 396 of the official report:

“There can be no doubt that Congress had power to give an action for damages to an individual who suffers by breach of the law. *W. W. Montague & Co. v. Lowry*, 193 U.S. 38, 48 L.Ed. 608, 24 Sup. Ct. Rep. 307.”

The overt acts from which damages arise form no part of a conspiracy, for the conspiracy and the overt acts are separate and distinct, so that a plaintiff in suing for treble damages resulting from an antitrust conspiracy bases *his cause of action* solely upon the conspiracy which is condemned in Secs. 1 and 2, T. 15, and not upon the *damages resulting* to him by reason of such conspiracy. In the opinion filed herein this Court failed to recognize such distinction and made a question of damages the gravamen of the action. That this distinction is fully recognized is shown by the following cases cited on pp. 4 et seq. of appellant's reply brief to the brief of Borax Consolidated, Ltd. They are:

Nash v. United States, 229 U.S. 373; 33 S. Ct. 780;
United States v. Socony etc., 310 U.S. 150; 60 S. Ct.
811;

United States v. New York etc. (5th Circ.), 137 F.2d,
459; (Cert. den. 320 U.S. 783),

where at p. 463 the Court quotes with approval from *Nash v. U.S.* supra and other cases of that Court.

Such cases were criminal cases but that the rule is applicable also in civil actions under the antitrust law was definitely decided by the case of

Albert Pick-Barth Co. v. Mitchell etc., 57 F.2d 96
(Cert. den. 286 U.S. 552).

In that case the Court said:

“To constitute an offense under section 1 of the Sherman Act, it is not necessary, if a conspiracy is proven, the purpose and intent of which was to eliminate by unfair means a competitor in interstate trade, to show that the public was affected, and to what extent. *Nor is it necessary under this act, as it is at common law, to prove any overt acts in order to constitute the offense defined in section 1*; but if overt acts are proved in furtherance of the offense defined in section 1, and anyone is thereby injured in his business or property, the conspirators under section 7 of the Act are liable therefor.”

The conspiracy of '29 charged upon herein and its purposes were alleged with particularity in the complaint (Tr. pp. 34 et seq.). **These allegations were not denied by appellees and therefore must stand admitted for all the purposes of this appeal.** Such allegations show the formation of the conspiracy, its purposes and activities, and its effects. The purposes of the conspiracy were set forth in detail and the activities of the defendants thereunder likewise alleged. A statement of the overt acts under such conspiracy so far as they affected plaintiff is set forth in the complaint, Par. 72 (Tr. pp. 40 et seq. to and including Par. 80, Tr. p. 53). Particularly are set forth (commencing Par. 77, Tr. p. 48 to Par. 80, inclusive) the overt acts

present in the so-called Little Placer Claim, the last of which occurred subsequent to the 31st day of July, 1944 as alleged in Par. 78 (Tr. p. 52). **Nowhere in the record is there any denial of such allegations, so for the purpose of this proceeding they must be considered as admitted.**

Par. 81 of the complaint (Tr. p. 53) alleges that all of the activities of defendants set forth previously in the complaint were pursuant to and in furtherance of the conspiracy, all of which acts resulted in damage to plaintiff in the amount named in that paragraph. Such paragraph includes the activities under the Little Placer Claim and includes all of the damages suffered by the misconduct and fraud of defendants into the one amount of damages alleged in such paragraph. Therefore the Little Placer activities having been included therein, the statement of the Court that no damages were suffered through such Little Placer activities is incorrect. The fact that difficulties may arise in the trial on the merits in ascertaining the damages resulting from the "Little Placer" overt act is no reason why they should be eliminated.

See

Bigelow v. RKO Radio Pictures, 327 U.S. 205, 66 S. Ct. 574; there it was held:

"Justice and public policy require that a wrongdoer shall bear the risk of uncertainty which his own wrong has created and which prevents precise computation of damages."

See Subdivision (5), p. 265, where it is said in part as follows:

"The constant tendency of the courts is to find some way in which damages can be awarded where a wrong

has been done. Difficulty of ascertainment is no longer confused with right of recovery' for a proven invasion of the plaintiff's rights." (Citing cases).

(Remember, please, that neither the allegations of Par. 81 nor of the preceding paragraphs setting forth the overt acts are denied in any respect by the appellees and therefore for the purposes of this proceeding stand admitted.) In the absence of a demand for particularity the lumping of the damages is all that is required. See

National Nut Co. v. Kelling, 61 F. Sup. 76 and cases cited.

The opinion of the Court overlooks entirely these admissions by appellees. The reference in the opinion to the so-called admissions of counsel for appellant that no damages had resulted from the activities of appellees in reference to the Little Placer go far beyond the real purpose and intent of the colloquy that was had between the lower court and such counsel. This question showed that the lower court failed entirely to realize the importance of these admissions in the pleadings by the appellees. Such conversation occurred during a discussion of the case of

Northern Kentucky Tel. Co. v. Southern Bell Co.,
73 F.2d, 333,

which holds that a conspiracy continues so long as overt acts are being committed by one of the conspirators. The discussion in question was as follows (Tr. pp. 234-242):

"The Court: Is it your contention, Mr. Carr, that plaintiff was put out of business in 1929 as a result of an unlawful conspiracy and that the statute does not

run as long as the conspiracy continues to be in effect?

“Mr. Carr: No, I do not go that far. My idea would be that it would run from the last overt act.

“The Court: What do you allege in the complaint to be the last overt act?

“Mr. Carr: The Little Placer claim. They have studiously avoided any discussion of the Little Placer claim until this morning, and then Mr. Lasky comes in with a motion to strike it out; it has no applicability. We could not prove any damages from it, but we make a live issue of that thing in the complaint. Beginning with paragraph 77 on page 36 we start in a story of the Little Placer claim. In paragraph 77 we approach it historically. There were, as a matter of fact, only 10 acres in this Little Placer Claim. It was the one, the only outstanding Kernite deposit that was known to exist in the world, and we had made our application. Counsel was right this morning in describing the two methods of acquisition, either by a mineral claim or by a lease, and the Government held that it was at one time subject to a lease. Now, we made application first on the land and our lease was turned down as a matter of law. Subsequently we went through various divisions of the Department of the Interior, and when we got to the head we finally won out completely, and the defendants, here, who were applying, were put out of court, leaving the claim wide open, which we believe was subject to our application which we had in, and on page 37 we set forth, we state:

‘That the facts of said endeavor of plaintiff to secure said lease upon said “Little Placer,” and the opposition of defendants thereto, is as follows:’

“Now, the defendants pursued us wherever we went in search of land or property, including this Little

Placer claim, particularly because of its very valuable possibility to the thing, and not only possibility, but a very valuable asset, because, as I have said, it was the last known and the only known held property in which the Kernite could be produced. The defendants held complete monopolization. They endeavored to keep us out of the Little Placer with further activity on their part, in the performance of their monopoly which they had. Then we go on in paragraph 78 to give some further account of our activity, and we say:

‘As set forth in paragraph 71 of this complaint, the defendants, Borax Consolidated, Ltd., and Pacific Coast Borax Company, have controlled since 1934, and now control, all of the world’s known Kernite deposits except 10 acres thereof, known as the Little Placer claim. Ever since June of the year 1928 plaintiff has been endeavoring to secure a lease from the said United States Government upon said Little Placer under and by virtue of the laws appertaining thereto, but all of such endeavors of plaintiff have been contested, fought and blocked by the actions of the defendants herein in pursuance to the said unlawful plan and conspiracies of said defendant to own, control and market all borax in all its forms and products, in all the world, and to prevent competition therein, and to that end, to drive plaintiff from all activities and business in the field of borax and its ownership, production and sale.’

“Then we set forth, as I say, the various acts, not only of ourselves, but of the defendants, and go on to show that our application for this particular lease is still pending, and the defendants, after this defeat before the Department of the Interior, applied for a

writ of mandamus in the District Court of the District of Columbia to force the Secretary to give to them this lease that they claimed.

“Another illustration contrary to that cited by counsel this morning to the effect that you could not reach that matter in court by legal proceedings, and that the matter rested wholly within their discretion is that while that action was pending for the writ of mandamus, the Government brought on for trial its action here before your Honor, and there the defendants charged stood up and admitted their wickedness and their guilt—

“Mr. Harrison: You do not mind if I interrupt again?

“Mr. Carr: Not at all, I expected it.

“Mr. Harrison: There was an express statement in the decree that we admitted nothing, your Honor.

“Mr. Carr: That is an anachronism. You cannot say you admitted nothing. This question is going to come all through this matter. I do not say that those judgments in that particular case constituted *prima facie* evidence, and that is the only thing that the court says they will not constitute, but that does not prevent us from calling upon that judgment in that case as an admission. It is ridiculous, and it never could be held that people coming in here and paying \$140,000 and saying, ‘I never did it at all’—if that was true and they had never been guilty and were not pleading in fact guilty to the charges made, the court would have had no jurisdiction. It would have had to throw the case out. The court could never have levied the fine. We do not contend, as I say, that any of those judgments, either in the civil or in the criminal case, are *prima facie* evidence, but we do say that it is evidence of admission of guilty,

and you can't get away from that no matter what you put in the judgments.

“Mr. Lasky: You overlooked the cases we cite.

“Mr. Carr: Oh, yes, but they do not go that far. You picked out a few little words here and there, but they do say they cannot be used as conclusive proof of the charges made, which we admit, but we do say that they do constitute admissions just like if I had met these people on the street and said, ‘Here you are charged with these crimes and with these misdemeanors and these acts,’ and they said, ‘Yes, we did it. We are guilty, but we thought we could get by with them.’ Then they come into court and enter a plea of *nolo contendere*, which is a sort of polite plea—that is about the best you can say about it. It is worse than a Scotch verdict—‘Not guilty but don’t do it again.’ It is a confession. You can’t get away from it, no matter what you put in your judgment here that they do not confess anything. If they did not confess it, how could the courts have levied the fine? You can never contend, in the face of the charges made, that it is a voluntary payment. They came in here and admitted those allegations. They have got to in order to save their hide. They know what might happen to them if the court did not take it. These consent decrees are simply a consent to a decree being entered against them in the matter, and then it is customary to go on and say, ‘Well, we do not admit anything. We are not guilty of anything, but we are going to pay you \$140,000, or whatever the court says we must pay.’

“There can be no question as to that. I will be glad to meet you on that when the time comes. I think there are plenty of cases and sound reasoning on that, and the statute, itself, only says it shall not

be prima facie evidence, which is all right, but that does not say that they are not admissions of guilt, and that is exactly what occurred here.

“Now, with respect to the Little Placer, we go on to say:

‘That all of the above acts done and performed by defendants, or some of them, have been pursuant to and in furtherance of said conspiracies, plans and combinations hereinbefore in this complaint set forth and described with the intent and purpose of controlling and dominating, throughout the world and in interstate commerce, the mining, production and sale of borax in all its various forms and products, and with the intent and purpose of injuring and destroying plaintiff’s activities as herein set forth and removing plaintiff as a competitor of defendants, or some of them, in the said mining, production and the sale of borax in all of its forms; that due to said intents, purposes and acts of defendants, plaintiff has been damaged,’ and so forth.

“That is a complete tie-in, a complete overt act. Nothing could be a stronger overt act than the activities of these defendants throughout this whole proceeding.

“And remember, may it please your Honor, so far as this motion is concerned, those are all admitted facts, that they did all of these things just as alleged in the complaint, and we (they) cannot say that that is not an overt act. Some contention was made that because we might not be able to recover damages by reason of their activities—true, we cannot for this particular overt act, *unless we can show actual damage, but that comes on the trial of the case and not on a motion to dismiss, where the statute is the main*

ground for their motion. That is factual and not legal to the extent we are considering today.

“The Court: Your client could have continued on in this business after 1929 without this Little Placer claim, could he not, in the absence of the alleged activity of the defendants?

“Mr. Carr: No, your Honor; as a matter of fact, when we were put out of business by the price cuts in 1929 we still had our plant, and we hung on and tried to make the thing go. We were trying to get this Little Placer. If we could have had the Little Placer we could have secured Kernite and we could have produced it somewhat on a comparable basis with the defendants, if we were not run out of business otherwise some way or other, but that would have given us a chance. We still own it. It is not alleged in the complaint as to the year, but we do say—

“The Court: I think you are referring to page 36.

“Mr. Carr: Maybe that is it, your Honor. It states, ‘And thereafter plaintiff struggled on as best it could to survive, but ultimately it was obliged to default in the payment of its rentals due under such Searles Lake lease.’

“We had one of those leases there and could not pay under it.

“* * * with the result that the United States of America, as lessor, canceled said lease and retook possession of said lands and buildings permanent installations thereon; that thereafter certain stockholders of plaintiff, in an endeavor to save the situation, applied to said United States Government for a lease upon said premises and equipment; said application was subsequently denied,

and thereafter said lease and improvements were offered for bid, at which time defendants, American Potash & Chemical Company, bid for said lease and was given the same for the sum of approximately \$130,000; (said lease contained certain additional land.)'

"The Court: Let me interrupt you again.

"Mr. Carr: Yes, certainly, any time.

"The Court: I am trying to get your point clear in my mind. Assuming, as you have alleged, the plaintiff was forced out of business, and, as the plaintiff alleges, the plant and business of the plaintiff was shut down in January, 1929—

"Mr. Carr: Yes.

"The Court: And thereafter he tried to keep his lease on the source of supply in good standing, but because the business was shut down and he did not have any money he was unable to keep that in good standing. I think that is a fair inference.

"Mr. Carr: That is correct.

"The Court: So from time to time he besought the Government to keep that lease in good standing for him.

"Mr. Carr: Yes, Your Honor.

"The Court: Because his business was closed down, or he could not get the money to do that, he was ultimately unsuccessful in maintaining that. Where is the overt act of the defendant that has to do with that?

"Mr. Carr: The overt act is the Little Placer claim."

Also, Tr. pp. 243-46, where counsel for appellant stated that plaintiff had the buildings and the plant at Searles Lake and was in a position to go ahead with its business.

“Mr. Lasky: The Searles Lake plant was at Searles Lake. The Little Placer was several hundred miles away, and was a mine. Do you contend we were going to use the material from the mine in the Searles Lake plant?

“Mr. Carr: Certainly. They carry many things—for example, aluminum and other ores—over two or three hundred miles. Take the iron ore up in the Michigan District. They bring it across the Great Lakes. Take Ford’s factory there at Detroit, or near Detroit.

“The Court: I do not think that is what counsel means. He is referring to the character—

“Mr. Lasky: Yes, the Searles Lake process was one of evaporation from the lake.

“Mr. Carr: We could have changed that. What is the difference? We had our buildings and our plant there. It is something which could have been changed, or if necessary we could have gone and built a plant, but we had our plant and we were perfectly willing to move it. There is nothing strange about that, bringing raw material to your plant, and there is nothing strange in changing the machinery in your plant to handle a different product. There is nothing strange in that, at all, except you might have struck ice picks in our tires going down there while we were carrying it in. But we contend, Your Honor, that the Little Placer is tied in directly into *your* business. The overt act continued from 1929, from the day we filed our application we met opposition from these people, and naturally they were doing their best to secure these ten acres because if they did, they would have had every known supply in the world of this Kernite. They could have had no opposition or no competition, whatsoever, and it was necessary for

them to do that, as they felt for their own protection to secure this in order to accomplish the fruits of the conspiracy which had long before that been established and created. And so we say that our complaint, blushinglly say it in the face of all the charges made against the fruit of it, that we do allege the combination, the unlawful combination both under sections 1 and 2 of the Antitrust Act. The complaint goes on and shows the performance of these overt acts, a continual set of them from the time we got in the business, and particularly from 1929 right on, and the denial by Zabriskie of intention to injure, and the further fact that we had no knowledge of the formation of this conspiracy. We knew nothing about it. That, we contend, was the basis of it, and the concealment of those conspiracies. As Your Honor said yesterday, they did not go out on the courthouse steps and talk blatantly about what they had done and were going to do to everybody. Of course not. They were concealed, and while we knew and felt the force of all these overt acts that were being placed against us during all this period of time, we had no knowledge of a conspiracy. We did not know that this contract of 1929 had been entered into prior, nor did we know of it subsequently. I think they call it the contract made after they came out here, shortly after their meetings in Germany and in England. They came out here and, as I said, scooped other victims into the thing and renewed their conspiracy with the Stauffer people, making them parties. They carried on a continuous conspiracy, and the only thorn in their side was Burnham. He was down there struggling to get ahead with his comparatively small plant against this octopus which was pouring out its wrath and indignation that we should even have

presumed to set out on a venture of this kind as against their wishes.

“As I say, we have proved the conspiracy. We have alleged the conspiracy in our complaint. We have alleged the overt acts, and we have alleged the last of which was the Little Placer situation, which was continued until they confessed their wickedness in this court and contended that this court should make as a part of its judgment an order that they should abandon all applications, all attempts to secure that particular claim. And it continued up until past the filing of our particular suit. And let me say this, that this conspiracy, framed under the provisions of sections 1 and 2 of the Antitrust Act, was never known to us and was not disclosed, and we could not find out about it until after the Government, with all its might, had brought its suit here and had disclosed the formation of that 1929 agreement and the subsequent western agreement out here.”

In this connection see also paragraph 80 of the complaint (Tr. p. 53) which alleges:

“80. That all of the actions and activities of the defendants, or some of them, in contesting the said application of plaintiff for said sodium lease upon said ‘Little Placer,’ were performed and carried out by said defendants for the purpose of preventing plaintiff from securing said lease upon said ‘Little Placer,’ and through which desired lease plaintiff would have been able to enter into competition with defendants in the production, manufacture and sale of borax in its various forms.”

This, in connection with the other allegations of the complaint, constitutes sufficient basis for a proof of the

prospective damages which were suffered by appellant through the activities of appellees in blocking the securing of its lease to the Little Placer. Such allegations are sufficient for such purpose.

Triangle Etc. Co. v. National Electrical Etc. Co.,
152 F.2d 398 (3d Circ.).

That appellant was counting on the lease of the Little Placer from which to obtain crude borax, thus enabling it to resume operations at its Searles Lake plant, is also shown by the testimony of Mr. Burnham to such effect (Tr. p. 574).

This question of damages was considered later on in the trial (Tr. pp. 785-6) where the following conversation occurred:

“The Court: You mean you could not show any damage from the 1929 conspiracy?”

“Mr. Carr: Under the 1929 conspiracy which we stand on here.

“Mr. Harrison: He does not plead any damage under the 1929 conspiracy.

“Mr. Carr: Oh, yes, we do. We plead lots of damage.

“The Court: Maybe I misunderstood what you just said. I gathered from what you said that you would not be able to show any damage from the 1929 conspiracy.

“Mr. Carr: *No, I said if we could not. I do not say we cannot, because we believe we can.* But the overt acts all go to the measure and extent of the damage resulting from the basic conspiracy of 1929. If we cannot, when it comes to the main trial, prove that those damages were incurred as the result of

the 1929 conspiracy, of course, we cannot recover. But that is not the question here. The question here is whether or not the statute has run as to the 1929 conspiracy, and nothing else is before this court at this time."

In view of the above it is difficult to understand why this Court should have indulged in so much discussion as to the claimed admission made by counsel for appellant that we could not prove any damages from the Little Placer activities. A reading of the allegations of the complaint, which are admitted by the defendants, coupled with the colloquy between the lower court and such counsel, show the real meaning of such statement of counsel, viz. that on this trial on the statute, and in face of the allegations of the complaint as to damages and the admissions by appellees of such allegations, including those resulting from the Little Placer activities, the discussion of the actual existence of such damages and the amount thereof would necessarily have to be postponed until the trial of the case on the merits. It is clear that what counsel meant, no matter how ineptly expressed, was that on the trial on the Statute of Limitations the question of damages was a legal one in which the existence of the same was admitted by appellees, the amount of which, however, would have to await the trial on the merits. That is a far cry from a statement that no damages could later on be proved. No significance is given by the Court to the admissions made by appellees through their failure to deny the allegations of the complaint and referred to above, including those in re Little Placer, which are of far more significance than the one statement of counsel for appel-

lant referred to so often in the opinion. *That statement was not evidence nor did it form any part of the record of the case.* That such is correct is definitely shown by the following exchange between the lower court and both of counsel (Tr. 392):

"Mr. Harrison: May I ask your Honor to state to the Jury that any statements made on matters are not evidence?

"The Court: You mean the statements by the counsel?

"Mr. Harrison: Yes, statements made by counsel.

"The Court: I thought I covered that.

"Mr. Carr: Yes.

"The Court: I spoke of the arguments by the Court and counsel and I meant to include the statements of counsel as well as the statements of the Court. Neither of them are evidence in the case, ladies and gentlemen."

In the opinion all of these admissions and such evidence as last quoted above are disregarded and passed by as of no moment. This must have been through inadvertence of the Court and we respectfully request that this point be re-examined by the Court and careful investigation made thereof.

Likewise, this Court seems to have taken for granted the statement of counsel for appellees that no overt acts were committed after 1929. Such is not correct. They were, in part, a conversation on October 19, 1937 between Mr. Emlaw and Mr. Baker representing certain of the appellees, and Mr. Burnham, in which both Mr. Emlaw and Mr. Baker stated to Mr. Burnham that "there is no connection between us, at all, between the two corpora-

tions," i.e., American Potash, etc., and Pacific Coast Borax (Tr. p. 396). This in the face of the admission of appellees of the allegations of the complaint in which they are charged with unlawful activities directed against appellant during that period; second, appellant lost its lease upon Searles Lake in the year 1938 (Tr. p. 792) as a direct result, as claimed in the complaint and admitted by the failure of appellees to deny, of the activities of appellees. That all of these activities of appellees were pursuant to the conspiracy was not discovered by appellant until the commencement by the government of its civil and criminal proceedings in this District in the fall of 1944 (Tr. pp. 754-5 and 690).

The above overt acts were in addition to the constant harassment of appellant by appellees during all of the period of time between the formation of the conspiracy in 1929 and the judgment of the District Court in 1944. This constant harassment is set forth and described with particularity throughout the complaint. In paragraph 81 of the complaint (Tr. p. 53) all of such activities are consolidated as "acts done and performed pursuant to said conspiracy." This allegation is not denied.

In addition, this Court implies that an overt act is not such unless it in itself causes damage. That is not a correct interpretation of the law, for an overt act need not necessarily bring about damage; it can be such without inflicting damage. For instance, the carrying of a letter from one conspirator to his co-conspirator could constitute an overt act and yet no direct or provable damage might result from the mere act of carrying such a letter. This point was directly passed upon by this Court, Justice Haney writing the decision, in

Marino v. United States, 91 F.2d, 691, pp. 694-5.

Judge Haney states:

“The crime is completed when an overt act affect the object of the conspiracy is done by at least one of the conspirators. An overt act is something apart from the conspiracy, and is ‘an act to effect the object of the conspiracy.’ *Joplin Mercantile Co. v. United States*, 236 U.S. 531, 535, 35 S. Ct. 291, 293, 59 L.Ed. 705. It need be neither a criminal act, nor the very crime that is the object of the conspiracy. It must, however, accompany or follow the agreement, and must be done in furtherance of the object of it.”

While the *Marino* case was a criminal action, the same rule would necessarily apply in a civil action. Interpreted in terms of a civil action, this would mean that an overt act need not be a criminal act nor in itself inflict damage. Several cases are referred to under Note 12, p. 695 which would lead to the same end as the *Marino* case.

Practically the same point was recently decided by this Court in the case of

Nye & Nissen v. United States, 168 F.2d, 846.

That involved a conspiracy by which the defendants planned to act. See subd. 1, p. 849, wherein it is stated that the conspirators’ plan to impede the Government’s functions was sufficient. No damage or actual activities were shown, the activities planned to be engaged in being held sufficient as overt acts. Even if the activities of appellees in preventing the Government from leasing the Little Placer to appellant, all as alleged in the complaint and admitted by appellees, did not finally result in computable damage to appellant, they were nevertheless overt acts in

furtherance of the conspiracy charged upon, and admitted. Such activities were abandoned only after the conviction of and judgment against certain of appellees in the District Court for this District and until such termination were, as alleged and admitted, continuing activities in furtherance of the conspiracy, and all directed against appellant.

The Statute of Limitations begins to run from the last overt act, not from each successive overt act.

The Court in its opinion concluded that the statute ran against each overt act at the time of its performance and not, as is the law, from the last overt act committed in pursuance of a conspiracy. On p. 13 of the pamphlet opinion the Court stated:

* * * “(b) a cause of action for damages for violation of the antitrust laws accrues when the damage is sustained and *the statute of limitations begins to run at that time;*”

That portion of the opinion read in connection with the further statement (p. 15) to the effect that the Court holds that this is an action at law for damages under Federal antitrust laws and the only damages for which a recovery might be had are those which accrued and were suffered within three years prior to the filing of the complaint, sets forth a conclusion that is not the law, *for the statute begins to run from the last overt act committed in furtherance of the conspiracy* and which in this case was subsequent to July 1944 when the United States Borax Co. commenced its mandamus action in Washington.

In *Fiswick v. United States*, 329 U.S. 211; 67 S. Ct. 224 (p. 216 of the Official Report) it is held:

“The statute of limitations, unless suspended, *runs from the last overt act during the existence of the conspiracy*. *Brown v. Elliott*, 225 U.S. 392, 401, 32 S. Ct. 812, 815, 56 L.Ed. 1136. The overt acts averred and proved may thus mark the duration, as well as the scope, of the conspiracy.”

The *Fiswick* case cites

Brown v. Elliott, 225 U.S. 392; 32 S. Ct. 812.

On p. 815 of the Supreme Court Rep. the Court said:

“In *Lonebaugh v. United States*, 103 C.C.A. 56, 179 Fed. 476, the circuit court of appeals of the eighth circuit considered the relation of the overt acts to the conspiracy and their effect in determining the application of the statute of limitations. The court said, by Mr. Justice Van Devanter, then circuit judge: ‘While the gravamen of the offense is the conspiracy, the terms of sec. 5440 (U.S. Comp. Stat. 1901, p. 3676); are such that there also must be an overt act to make the offense complete (*Hyde v. Shine*, 199 U.S. 62, 76, 50 L.ed. 90, 94, 25 Sup. Ct. Rep. 760); and so the period of limitation must be computed from the date of the overt act rather than the formation of the conspiracy. And where, during the existence of the conspiracy there are successive overt acts, *the period of limitation must be computed from the date of the last of them of which there is an appropriate allegation and proof, and this although some of the earlier acts may have occurred more than three years before the indictment was found.* (Citing cases)’ ”

Measured by such rule the statute of limitations has no application, for this complaint was filed within three years subsequent to the last overt act of the conspiracy, viz. the commencement of the mandamus proceeding involving

the Little Placer subsequent to July 31, 1944 (Tr. p. 52) during which time the Moratorium Act was in effect (Ch. 589, 56 St., 781, 77th Congress.)

From the above, we respectfully submit, is shown the error of those portions of the opinion quoted at the beginning of this subdivision.

II.

EVEN IN AN ACTION AT LAW THE STATUTE OF LIMITATIONS BEGINS TO RUN ONLY AFTER DISCOVERY BY THE PLAINTIFF OF THE EXISTENCE OF A CONSPIRACY AND HIS CAUSE OF ACTION.

American Tobacco Co. v. Peoples Tobacco Co., 204 Fed. 58 (C.C.A. 5th).

This was a civil action for damages under the antitrust act and was a case similar in many respects to the one herein presented. On p. 61 the Court said:

“The court then proceeds to state that the petition was filed in January, 1908, and that the plaintiff alleges he did not know of the combination and its operation against him until December, 1907, clearly indicating, and saying to the jury, and so they must have understood, that if the plaintiff knew, or could have known, more than a year before the filing of its petition, of this unlawful combination against it, the plea of prescription would be good. The view of the court, as indicated by the charge, was that prescription did not begin to run until the Peoples Tobacco Company knew, or ought to have known, of the agreement or arrangement called ‘a combination or conspiracy’ on the part of the other tobacco companies against it. *While it might have known that its profits were falling off, and that the competition of the Craft*

Tobacco Company was causing this, this could not give it a cause of action under the provisions of the Sherman Law, and until it discovered that it had a right of action prescription would not commence to run. We think this states substantially the law of the case, and is the correct view of the question of prescription."

The italics portions of the above quotation show the striking similarity to the facts presented in the case at bar, for here, while appellant knew that it was being damaged, and may have at various times believed that the acts of appellees were the cause thereof, that alone did not give appellant a cause of action under the Sherman law until it discovered the conspiracy of 1929. Further, the Court stated (p. 63) as follows:

"Why should not the prescriptive period in this case commence at the time the combination against the plaintiff was discovered? The Sherman Act gives the right to an action for conspiracy to injure the business of the plaintiff, such as was alleged, and such as we must consider to have been established in this case. No action could be brought by the plaintiff until he had knowledge of the facts which gave him a cause of action. We think the court below was right in holding as it did on this question."

The Court cited and relied upon the case of

Bailey v. Glover, 21 Wall. 342; 22 L.ed. 637.

On p. 62 the Court in the *Tobacco* case quoted from *Bailey v. Glover* as follows:

"In *Bailey v. Glover*, 21 Wall. 342, 22 L.Ed. 636, in the opinion by Mr. Justice Miller, this is said:

‘In suits in equity, where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud. We also think that in suits in equity the decided weight of authority is in favor of the proposition that, where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or effort on the part of the party committing the fraud to conceal it from the knowledge of the other party.’

“Afterward in the opinion the following is added:

‘But we are of opinion, as already stated, that the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity. And we are also of opinion that this is founded on a sound and philosophical view of the principles of the statutes of limitation. They were enacted to prevent frauds—to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself, until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason

why this principle should not be as applicable to suits tried on the common-law side of the court's calendar as to those on the equity side.'

"This case of *Bailey v. Glover* has since been frequently recognized in decisions by the Supreme Court and other United States courts. In *Traer v. Clews*, 115 U.S. 528, 6 Sup. Ct. 155, 29 L.Ed. 467, the court, in discussing the question involved here as to the suspension of the statute of limitations, where the facts on which the case was based had been concealed, said (115 U.S. 538, 6 Sup. Ct. 159, 29 L.Ed. 467):

'The case of *Bailey v. Glover* has never been overruled, doubted, or modified by this court.'

"Many other authorities to the same effect might be cited, but the foregoing are considered sufficient to establish the principle which must control here."

This rule laid down in *Bailey v. Glover* was adopted by the Supreme Court in the *Holmberg* case, *supra*, and also in the *Peoples Tobacco* case, *supra*.

III.

THE COURT ERRED IN HOLDING THAT APPELLANT KNEW FROM MAY 17, 1929 TO OCTOBER 10, 1939 THAT IT HAD BEEN DRIVEN OUT OF BUSINESS BY ACTS OF APPELLEES WHICH VIOLATED THE ANTITRUST LAWS. (Pamphlet opinion, page 15)

Under the evidence as presented the case should have been submitted to the jury, not taken from it and decided by the Court, because there was a direct conflict in the testimony, which entitled appellant to have the point in question submitted to the jury. During Mr. Burnham's testimony he was asked and answered as follows (Tr. p. 356):

"Q. Mr. Burnham, did you know on May 17, 1929 or at any time between May 17, 1929 and October 10, 1939, inclusive, that the business of the Burnham Chemical Company, the plaintiff herein, had been damaged by the acts of the defendants, or some of them, in violation of the Antitrust Laws?

"A. No.

"Mr. Harrison: I object to that on the ground it calls for the conclusion of the witness, if the Court please, is leading, and is the precise issue to be passed upon by the jury.

"Mr. Carr: It is asking him about a fact, whether he knew.

"The Court: I will overrule the objection. You can cross-examine him on that.

"Q. (By Mr. Carr): What is your answer, Mr. Burnham?

"A. The answer is 'No.'

"Q. Did you do anything from May 17, 1929 to October 10, 1939, inclusive, to ascertain whether or not the defendants herein, or some of them, had violated the Antitrust Laws?

"A. Yes, I did.

"Q. What did you do?

"A. I did a great many things."

Thereafter the witness testified to his many activities, in the West, in Washington, D.C. and in various States, undertaken in an effort to discover whether or not defendants had violated the antitrust laws. He further testified as to his inquiries made of various Government agencies and his requests to them for assistance in the determination of such question, and of his inability to secure such assistance or information.

On cross-examination appellees introduced many documents which they contended showed belief (but not knowledge) on the part of Mr. Burnham in and of the existence of the conspiracy charged upon in the complaint, the cause of action. In spite of our many objections the lower court allowed such evidence although many of the facts referred to incidents that occurred prior to the formation of the conspiracy of '29 and even prior to the date May 17, 1929 fixed by the court in its pre-trial order. Even if such pre-trial order was correct, which we claim it was not, such testimony raised straight questions of fact, viz. as to the belief or knowledge of Mr. Burnham, and which facts should have been submitted to the jury for its determination. The lower court erred in taking this case from the jury—a plain question of fact was at issue, viz. whether or not Mr. Burnham had such belief or knowledge as suggested in the pre-trial order. The purpose of calling the jury was to have it pass upon just that fact, yet when the same was presented in the evidence, the court withdrew the case from the jury and decided it itself.

This, we again contend, was reversible error.

We also respectfully submit that in view of the record and the foregoing facts it was not the right nor within the province of this Court to pass upon such question of fact or to express itself as it does on p. 15 of the pamphlet opinion. Without affirmatively approving the pre-trial order of the lower court referred to on p. 6 of the pamphlet opinion, this Court in effect does approve

such pre-trial order and this in the face of the decision of this Court itself. In

Fleishhacker v. Blum, 109 F.2d 543,

Judge Healy stated:

“We are satisfied that the proof is such as to require a finding that the Bank did not discover the fraud until appellees brought it to light by their investigations. Hence the action is not barred as to the Bank.

“The word ‘discovery,’ as used in the statute means actual knowledge, or knowledge of facts which in the exercise of due diligence, would have led to an actual discovery of the fraud. *Consolidated Reservoir & Power Co. v. Scarborough*, 216 Cal. 698, 701, 703, 16 P.2d 268; *Lady Washington etc. Co. v. Wood*, 111 Cal. 482, 46 P. 809; *Victor Oil Co. v. Drum*, 184 Cal. 226, 240, 193 P. 243; *Prentiss v. McWhirter*, 9 Cir. 63 F.2d 712, 715.”

The pre-trial order is directly contrary to such holding, for such order is based on “belief” rather than “discovery.” In the face of the decision in the *Fleishhacker* case it is difficult to understand how this Court could have approved, even inferentially, the pre-trial order.

This Court, while relying on the State Statute of Limitations, refuses to give the interpretation placed thereon by the Courts of California in such cases as *Pashley v. Pacific Electric Co.*, 25 Cal.(2) 226.

The same rule was announced in

American Tobacco Co. v. Peoples Tobacco Co., 20 Fed. 58,

holding that the period of limitation did not begin to run until the plaintiff had *discovered the existence of the conspiracy*—its cause of action. This does not mean *belief* that such cause of action existed—it holds that actual discovery of the same is necessary before the statute begins to run. The actual discovery by appellant of the existence of the conspiracy did not occur until the filing by the Government of its indictment and action in the District Court in 1944. That is alleged in the complaint and that was Mr. Burnham's testimony. The question of whether or not such testimony was correct should have gone to the jury.

We have contended all along that the pre-trial order did not state the law. We again affirm that contention, basing our belief upon Judge Healy's opinion in the *Fleishhacker* case as well as the other authorities cited in our various briefs, particularly our opening brief (pp. 7 et seq.).

The statement in the opinion at p. 15 of the pamphlet report, commencing with the word "Quotations" and ending with the words "and so advised it," is a direct repudiation of the holding of the authorities cited *supra*, to the effect that such an action as the present is upon the *conspiracy* and not upon the damages suffered. The charges as to the conspiracy of '29 and alleged in the complaint are totally ignored and the opinion is based upon the overt acts. The statement that appellant was *convinced* that it had a case against appellees by reason of the violation of the anti-trust laws is directly contrary to the testimony of Mr. Burnham; he spent days and months trying to ascertain whether or not such violation

existed without an answer, until the Government commenced its actions in 1944, after long and difficult investigations. The evidence introduced by appellees shows the endeavors of Mr. Burnham to discover the real facts and is confirmatory of Mr. Burnham's testimony instead of contrary to it. Therefore, the question of fact presented was as to whether or not Mr. Burnham *should have discovered* through such activities on his part, the conspiracy and intents of appellees. That was a question of fact which should have gone to the jury—it was for that very purpose that the lower Court called the jury. The question is whether a plaintiff in such situation *discovered* or should have *discovered the cause of action*, not whether he believed in the existence of the cause of action.

As to the Question of Concealment

From the way the opinion is written it is difficult to determine whether or not the part beginning with (f) on p. 15 is the claim of appellees or the opinion of the Court. Such question was fully discussed in our briefs, to which we refer, viz., Reply Brief, p. 24 to 29 inc., also Reply Brief to American Potash, etc., pp. 8 to 11 inc. Fraudulent concealment was clearly proved. Furthermore, the public interest is always present in these anti-trust cases, whether they be government or private actions.

IV.

THIS COURT ERRED IN REFUSING TO APPLY THE DOCTRINE OF HOLMBERG v. ARMBRECHT, 327 U.S. 392.

Both the *Holmberg* case and the one at bar are based upon Federal statutes creating rights of action, and there

would seem to be no reason why the rule adopted in the *Holmberg* case should not be equally applicable to the facts presented herein. That the *Holmberg* case was on the Equitable side of the court was not because it was an action to recover the double liability of bank stockholders as indicated in the opinion of this Court, but because of the concealment by Bache of his ownership of the stock a question. See p. 397 of the Report of the *Holmberg* case. Here, the evidence shows without doubt the concealment by appellees of their intent to destroy appellant and the formation of the conspiracy of '29 so to do, by reason of which situation the rule of the *Holmberg* case should have been adopted herein, or at least the case should have been sent to the jury for a finding as to whether or not, from the evidence presented, appellant had discovered the conspiracy—not believed in the existence of a conspiracy.

V.

THIS COURT FAILED TO PASS UPON THE FOLLOWING QUESTIONS PRESENTED AND URGED IN APPELLANT'S VARIOUS BRIEFS.

(a) The Court failed to pass upon the question of whether or not a conspiracy to destroy another financially is in and of itself a fraud upon the person against whom such activities are directed.

This was urged vigorously in appellant's brief in reply to the brief of Borax Consolidated, Ltd. et al, pp. 14 et seq.

(b) The Court failed to pass upon the validity of the pre-trial order of the lower court. Throughout we have earnestly contended that such pre-trial order was an erroneous statement of the law in that it used "belief"

instead of "discovery" as the starting point of the running of the statute. This was presented in our opening brief, p. 14, and in our reply brief to the brief of Borax Consolidated, pp. 18 et seq.

(c) Likewise this Court failed to pass upon appellant's claim that the lower court erred in refusing to allow counsel for appellant to read to the jury the complaint and the answers thereto. This point was raised in our Opening Brief, p. 30, and in our reply to the brief of Borax Consolidated, p. 29. We contend that such refusal was grievous error, in the face of the failure of appellees to deny any of the allegations of the complaint, with the exception of three paragraphs thereof.

(d) This Court failed to pass upon the claim that the conspiracy alleged was a continuing conspiracy under the doctrine of *United States v. Kissel*, 218 U.S. 601. This question involved the very important question of whether or not the doctrine laid down in the Kissel case as to a continuing conspiracy in a criminal case was also applicable in a civil proceeding. This point seems to have been totally disregarded by this Court. See Opening Brief, p. 32; also Reply Brief, p. 32.

All of the foregoing points are important and were urged in good faith, and we respectfully submit are entitled to a determination by this Court, especially where, as here, questions of first impression are presented.

VI.

**THE COURT ERRED IN HOLDING THAT FINDINGS OF FACT
AND CONCLUSIONS OF LAW WERE NOT NECESSARY.**

(Pages 8 and 9 of pamphlet)

This Court treats this part of the case as though this trial on the statute of limitations arose on the motions to dismiss and for summary judgment. Such an inference is not correct. The motion for summary judgment was denied prior to this particular trial on the statute (Tr. p. 183). This particular trial was solely and separately on the question of the statute of limitations, not the state statute alone but on every statute of limitations which could be used. The opinion suggests that the question of the statute was restricted altogether to the California state statute, which was incorrect, for at all times we urged that the statutes applicable in an equity proceeding were controlling here. While it is true (Tr. p. 185) that the decision on the motion to dismiss and strike was reserved until the special issue was decided, we contend that such special issue was never legally or properly decided and that the question of fact as to the statute presented should have gone to and been passed upon by the jury. Or, even in the event that the action of the Court in withdrawing the case from the jury might be held to be proper, the judgment of the Court thereon should have been backed by findings and conclusions of law. On the particular hearing on the statute, the motion to dismiss played no part whatsoever. They were separate and distinct proceedings, and this Court should so have treated them. As the lower Court elected to withdraw the case from the jury and pass upon it as a court matter, it was governed in such action by all

of the rules requiring the preparation and filing of findings of fact and conclusions of law. This Court cannot say that appellant did not suffer prejudice by the lower Court failing to do so.

By reason of all of the foregoing, it is respectfully submitted that a rehearing should be granted.

Respectfully submitted,

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THURMAN ARNOLD,
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No. 11767

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WALTER M. HEDER, a Minor, by his GUARDIAN AD LITEM,
ALTA R. HEDER,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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APPELLEE'S REPLY BRIEF.

Preliminary Statement.

Appellant has ignored the pleadings. Appellee contends that it will be simpler for the Court to arrive at a correct solution of the problems involved if a brief summary of the essential allegations made and omitted in the libel are called to the Court's attention.

Appellant alleges that on or about August 7, 1945, while discharging the duties of his employment and while acting within the scope of his employment he was required to man and control a niggerhead so as to raise, with the help of other crewmen, a boat to the deck of the vessel and that during said operation he was ordered to standby the niggerhead on the starboard side of said

vessel at the aftermost winch and at a particular time in the raising of the boat from the ocean to the deck of said vessel he *was given an order to hold the line with his hand on the niggerhead*, so as to permit the line, coiled around the spool, or niggerhead, to slip on the spool. In attempting to do this, the line, wrapped around the niggerhead and connected to the boat being pulled to the deck, instead of slipping on the spool, gripped the spool and continued to turn with the spool and it ground appellant's left thumb off at the first joint.

"That respondent was careless and negligent in its control of the operation of raising the particular boat at the aforesaid time and place to the deck of said ship at the time of libelant's accident and was more specifically negligent in the following particulars:

"1. In ordering this libelant to hold this line and keep it from turning on the aforesaid niggerhead at a time when the line was wet and would be apt to grab the libelant's hand as he attempted to hold it in place.

"2. In requiring this libelant and his fellow seamen to raise the boat to the deck of this ship by means of the starboard niggerhead on the ~~foremost~~ ^{aftermost} winch after the boatswain, Walter Raymond Owens had suggested to the first mate, Mr. John A. Bockleman, that they use the winch drum instead of the niggerhead. This suggested means of raising the boat to the deck was a more efficient and safer way of doing this work.

"That as an approximate (*sic*) result of the respondent's negligence, and because thereof, the libelant has suffered the loss of his left thumb, etc." (Ap. 4-5.)

Appellee, in its answer, admitted that on or about July 8, 1945, the libelant signed on the vessel mentioned as an able bodied seaman, at San Pedro, California, as an employee of respondent for an ocean voyage to Okinawa in the Pacific Ocean; that on or about August 7, 1945, the appellant was generally acting in the course of his employment and was generally discharging the duties of his employment, but denied the remaining allegations and each thereof in Article III of the libel. Appellee denied each and every allegation in Articles IV and V of the libel; denied that all or singular the premises are or any thereof is true, but admitted that the premises are within the Admiralty and Maritime jurisdiction of the United States and of the District Court of the United States, in and for the Southern District of California, Central Division; denied that appellant has been damaged in any sum whatsoever or at all.

As a separate and special defense, appellee alleged that on or about August 7, 1945, the libelant negligently and carelessly stood too close to operating machinery and negligently and carelessly placed his left thumb in a dangerous position and as a proximate result thereof the end of his left thumb was caught and pinched making it necessary for appellant to have the distal end of his left thumb amputated.

Libelant failed to allege that at the time of his injury he was a member of the crew employed on a United States vessel as an employee of the United States, through the War Shipping Administration.

His failure to allege that he was employed by the United States, through the War Shipping Administration, results in a fatal defect in his libel. No cause of action against the United States is stated unless the

libelant alleges that the libelant was, at the time of his injury, employed on a United States vessel as an employee of the United States, through the War Shipping Administration, for the reason that it is only such employees who have a right to prosecute an action for damages for personal injuries pursuant to the provisions of the Suits in Admiralty Act in the event the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act. The libel alleges and the answer admitted that the vessel involved was at all times employed and engaged as a merchant vessel of the United States Merchant Marine. (Ap. 4 and 7.)

In support of appellee's contention that the libel fails to state facts sufficient to constitute a cause of action, please see the following cases:

Lopez v. United States, 59 Fed. Supp. 831;

Siclana v. United States, 56 Fed. Supp. 442;

Piascik v. United States, 65 Fed. Supp. 430.

In addition to the foregoing claimed fatal defect in the libel, appellee contends that it is very doubtful whether the trial court had jurisdiction over the subject matter. It is elementary that the United States of America is entitled to absolute immunity from suit or action of any kind either at law, in equity, or in admiralty, unless the United States has consented to be sued on the cause of action shown by the pleading to exist. The rules clearly require that any individual seeking to maintain an action of any kind against the United States must show by allegations of fact that his cause of action comes within some specific statute or combination of statutes pursuant to which the Congress has waived the sovereign immunity of the United States of America. It is also

the contention of appellee that unless the pleading shows such facts no court has any power to proceed and must of its own motion dismiss the action for lack of jurisdiction. The fact that the United States of America files an answer in any action commenced in any court, whether state or federal, does not establish or tend to establish that such court possesses jurisdiction to adjudicate the claimed dispute. The sovereign immunity of the United States cannot be created by resort to the fiction that when the United States files an answer it is presumed that the nation thereby consents to be sued and to abide by any judgment rendered. No officer, agent or employee of the United States of America, from the President of the United States down to a person possessing the minimum amount of authority as an agent of the United States, has the slightest power to waive the sovereign immunity of the United States or to consent that the United States be sued.

In support of appellee's contention that the District Court was without jurisdiction and that therefore the jurisdiction of this Court, being derivative, is likewise subject to serious question, please see:

Stanley v. Schwalby, 162 U. S. 255, 40 L. Ed. 916;

Minnesota v. United States, 305 U. S. 382, 83 L. Ed. 235;

United States v. Shaw, 309 U. S. 495, 84 L. Ed. 888;

United States v. Clyde Mallory Lines, 127 F. (2d) 569;

The Isonomia, 285 Fed. 516.

Appellant may advance the contention that statutes permitting seamen to sue the United States of America should be liberally construed even to the extent of asking this Honorable Court to amend such statutes under the guise of interpretation. Appellee's answer to any such contention is that all statutes waiving the sovereign immunity of the United States must be construed by recourse to exactly the same rules. If the rule were otherwise the courts would, by judicial fiat, usurp the functions of the Congress and place seamen in a more favorable position and grant to seamen privileges which cannot be enjoyed by claimants contending a right to recover war risk insurance, tax refunds, claims auditable in the General Accounting Office, claims under the Tort Claims Act and claims of various and sundry persons, firms and corporations who are entitled, when the proper conditions exist, to maintain suits in admiralty under the Suits in Admiralty Act and the Public Vessels Act.

Appellee directs this Court's attention to the decision of the Circuit Court of Appeals, 5th Circuit, in *Fox v. Alcoa S. S. Co.*, 143 F. (2d) 667. The United States Supreme Court denied a petition for certiorari in said case on December 18, 1944 and it can therefore be accepted as the last word of the highest court in the land upon the subject that the United States could not have been sued at all except for the provisions of the Act of March 24, 1943, 50 U. S. C. A. App. Sec. 1291(a) and that suit can be maintained *only* upon the terms it fixes.

Upon the basis of the foregoing argument and authorities appellee contends that the libel fails to state facts sufficient to constitute a cause of action or a case within the cognizance of the district court and that the said court was required, in any event, to dismiss the libel.

Questions Involved.

The appellant, on page 5 of his Opening Brief, contends that there are three questions involved in the case, as follows:

1. Was appellee negligent toward appellant?
2. Did appellee's negligence cause appellant's injury.
3. Was appellant negligent?

Appellee contends that these questions do not specify any point which can be asserted in a court of appellate jurisdiction. The actual questions, if proper assignments of error are made in a case of this kind, are:

1. Has the trial court erred in its findings on the issues raised by the pleadings?
2. Is there sufficient evidence in the record to legally support the findings actually made by the trial court?

The appellant is proceeding upon the theory that if there is any possible basis of liability shown by the testimony and other evidence introduced in the trial court, whether embraced within the general maritime rule that the employer is liable for injuries sustained in consequence of the unseaworthiness of a vessel or of a failure to supply and keep in order the appliances appurtenant to the vessel, or pursuant to the terms of the Jones Act, which incorporated only those statutes of the United States which modify or extend the common law right or remedy of railway employees engaged in interstate or foreign commerce, then the trial court committed error in failing to find for the appellant even though he has utterly failed to prove the allegations of fact contained in his libel and upon which basis he invoked the powers of the district court to adjudicate his claim.

An examination of the Specifications of Error will show that the appellant is confusing the remedies which have been held by the United States Supreme Court to be inconsistent and as between which he was required to elect.

The United States Supreme Court has held, in the only cases where the point was involved, that a seaman injured in the course of his employment has the right to do one of two things: First he may prosecute a suit in admiralty or an action in a common law court for indemnity in consequence of the unseaworthiness of the vessel or of a failure on the part of his employer to supply and keep in order the proper appliances appurtenant to the vessel; or, second he may maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply.

Appellee contends that when a seaman files a suit predicated upon alleged negligence and the complaint or libel in such action alleges that the injury complained of resulted in whole or in part from the negligence of any of the officers, agents or employees of the employer of such seaman or by reason of any defect or insufficiency, due to its (the employer's) negligence in its appliances, boats or other equipment, such act on the part of such seaman constitute an election to maintain the action pursuant to the Jones Act.

"Seamen may invoke, at their election, the relief afforded by the old rules against the ship, or that provided by the new against the employer. But they may not have the benefit of both"

Plamals v. Pinar del Rio, 277 U. S. 151, 72 L. Ed. 827.

“Any decisive action by a party with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and one of the most unequivocal of such determinative acts is the bringing of a suit based upon one or the other of these inconsistent conclusions.”

U. S. v. Oregon Lumber Co., 260 U. S. 290, 67 L. Ed. 261;

See also: *Robb v. Vos*, 155 U. S. 13, 39 L. Ed. 52.

“The election for which it (Jones Act) provides is between the alternatives accorded by the maritime law as modified and not between that law and some non maritime system.”

The Arizona v. Anelich, 298 U. S. 110, 80 L. Ed. 1075.

“Rightly understood, the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seaman to do so. On the contrary, it brings into that law new rules, drawn from another system, and extends to injured seamen a right to invoke, *at their election, either* the relief accorded by the old rules, *or* that provided by the new rules. The election is between alternatives accorded by the maritime law as modified, and not between that law and some non maritime system.” (Emphasis added.)

Panama Railroad Co. v. Johnson, 264 U. S. 375 68 L. Ed. 748.

“The right to recover compensatory damages under the new rule (Jones Act) for injuries caused by negligence is, however, an alternative of the right

to recover indemnity under the old rules on the ground that the injuries were occasioned by unseaworthiness; and it is between these two inconsistent remedies for an injury, both grounded on tort, that we think an election is to be made under the maritime law as modified by statute."

Pac. S. S. Co. v. Peterson, 278 U. S. 130, 73 L. Ed. 220.

"But we think that election required by the statute is sufficiently indicated where a person entitled to the benefit thereof, brings an action at law, alleging negligence and praying for damages."

Hammond Lumber Co. v. Sandin, 17 F. (2d) 760.

"The present suit is not brought merely to enforce the liability of the owner of the vessel to indemnify for injuries caused by a defective appliance, without regard to negligence, for which an action at law could have been maintained prior to the Merchant Marine Act; and we need not determine whether, if it had been thus brought under the old rules, the state statute of limitations would have been applicable. See *Western Fuel Co. v. Garcia*, 257 U. S. 233. Here the complaint contains an affirmative averment of negligence in respect to the appliance, and, having been brought after the passage of the Merchant Marine Act, we think the suit is to be regarded as one founded on that Act, in which the petitioner, instead of invoking, as he might, the relief accorded him by the old maritime rules, *has elected* to seek that provided by the new rules in an action at law based upon negligence,—in which he

not only assumes the burden of proving negligence, but also, under Section 3 of the Employers' Liability subjects himself to the reduction of the damages in proportion to any contributory negligence on his part."

Engel v. Davenport, 271 U. S. 33, 36; 70 L. Ed. 813, 816.

Appellee therefore contends that the appellant is in no position at this time to predicate any claim of recovery upon the assertion that the appellee was negligent in failing to provide "a safe place in which appellant was ordered to work." (App. Op. Br. 6.)

It has been held, and appellee contends the ruling was correct, that the maritime counterpart of the common law safe place to work doctrine is "unseaworthiness of the vessel."

"The ground on which the right to recovery is rested is that the pump was so defective as to render the ship unseaworthy as respects appellee, and to amount to a negligent failure of duty to supply and keep in order the proper appliances appurtenant to the ship—a duty analogous to the ordinary duty of a master to furnish his servant a safe place to work and safe appliances to work with."

Globe S. S. Co. v. Moss, 245 Fed. 54 at 55 (Cert. denied, 245 U. S. 663, 62 L. Ed. 537.)

Appellee reiterates the point that there is no allegation in Article IV of the libel, the charging part thereof, alleging any ~~claim~~^{claimed} defect or insufficiency due to the negligence of appellee in its appliances, boat, or other equipment. There are only two claimed acts of negligence set forth in the libel and neither relates to any alleged defect

or insufficiency in any part of the vessel or in any of the physical equipment or appliances appurtenant thereto.

In this case appellee deems it appropriate to call the attention of this Honorable Court to the fact that in an action prosecuted under the Jones Act there is no requirement that a place of work be absolutely safe. The Jones Act does not in and of itself specify any basis of liability. It is necessary, in order to ascertain what the grounds of liability may be, to examine and understand those portions of the Federal Employers' Liability Act which modify or extend the common law right or remedy in cases of personal injury to railway employees engaged in interstate or foreign commerce. The Jones Act does not support to embrace all of the provisions of the Federal Employers' Liability Act. The object of the Congress in enacting the Jones Act and incorporating therein by reference all statutes of the United States which modify or extend the common law right or remedy available to employees of interstate or foreign carries by railroad, was to create a liability on the part of employers of seamen for injuries proximately caused by negligence of the officers of the vessel or fellow crew members of the seamen. This was the only right which the Congress could have conferred upon such injured seamen in view of the fact that a seaman already had full and complete remedies in the event he was injured in consequence of the unseaworthiness of the vessel or a failure on the part of the employer to supply and keep in order the appliances appurtenant thereto. The seaman's right under the general maritime law in these last mentioned respects did not require any proof of negligence on the part of the employer but exonerated the employer from liability in the event the injury was proximately caused by negligence on

the part of fellow crewmembers including the master. (*Mahnich v. Southern Steamship Co.*, 321 U. S. 96, 88 L. Ed. 561.)

Pursuant to the Federal Employers' Liability Act, proof of an actual defect in a boat, equipment or other appliance, does not establish a *prima facie* case. Such law requires the injured employee to allege and prove by a preponderance of substantial evidence that such condition not only existed but was due wholly or in part to negligence. Appellee also contends that the only duty on the part of an employer under the Federal Employers' Liability Act is to furnish a boat, equipment or appliance which is reasonably safe when used for an intended purpose by an ordinarily intelligent employee.

In further support of appellee's contention that the appellant has confused the two inconsistent remedies hereinabove referred to, appellant cites the decisions of the United States Supreme Court in *Mahnich v. Southern Steamship Co.*, 321 U. S. 96 and *Seas Shipping Co. v. Sieracki*, 328 U. S. 85. These decisions have nothing whatever to do with actions prosecuted or which could have been prosecuted under the Jones Act. In the *Mahnich* case the seaman predicated his claim exclusively upon the general maritime law without reference to the Jones Act. In the *Seas Shipping Company* case the libelant was a longshoreman and as such he could not have prosecuted any action under the Jones Act against the Seas Shipping Company for two obvious reasons: 1. He was not an employee of the Seas Shipping Company and (2) He was not a seaman as that word is used in the Jones Act.

Appellant Failed to Prove the Allegations of His Libel With Reference to Claimed Negligence.

The appellant testified that: While the ship was just off the Island of Okinawa he was engaged with other seamen in raising a motor life boat, having received his orders from the bos'n of the ship; that the boat falls were led from the davits to the snatch block on the boat deck, then to the crosstree on the mizzenmast to another snatch block, then to another snatch block alongside No. 5 hatch and then to the niggerhead on the after windlass at which position he was standing. [Rep. Tr. 4-6.]

At the time of the accident I was behind the niggerhead and was given the order by the hatch tenders, who were on the boat deck and the catwalk above No. 5 hatch, to surge the line. I was not given an audible order but it was indicated by the man on the boat deck with his hand to "avast heaving" which means stop the raising of the boat. My position would be to stop the line from gripping the niggerhead by surging it so that it would not come any further. I surged the line until the accident happened. [Rep. Tr. 8-10.]

I had to see that the line came off of the niggerhead with a straight lead and fell on the deck in the proper place and also see that the line remained on the niggerhead and kept a steady strain on the boat falls. The man on the port niggerhead and myself on the starboard niggerhead had the duty to surge the line to keep it from heaving. When you surge a line that loosens it on the niggerhead so that it will not grab and pull it. [Rep. Tr. 13-14.]

The considerations which determined me to put more or less turns around the niggerhead were that the weight being lifted by the winch naturally would govern the

number of turns. The more the weight the more turns you would have to put around the niggerhead to hold that fast or to keep it heaving. A few number of turns would tend to surge itself without strain on the hauling part, that is, the loose end of the line coming off the niggerhead. It would be easier to get out of control if the weight was lessened by some action on the boat. [Rep. Tr. 15-16.]

I would say I had five turns around the niggerhead most of the time. The rope was a 3-inch line. I imagine it would be pretty wet by that time because it was squally weather. It is subject to weather at all times, and it was equally at the time. The boat falls are always kept new. They were renewed at the beginning of the trip or during the first part of the voyage.

The way in which I surged this line to keep it from turning on this spool was I placed my hand on the turns, on the niggerhead by a slight pressure; that is all that is needed on any amount of turns, just to hold it in the opposite direction as it is turning; it will surge the line so that it will remain on the spool and not grab it and turn. I used my left hand to do that. I always have my right hand on the hauling part of the rope or the loose end that was coming off the winch or the niggerhead; my left hand was on the coil of rope that was twisted around the spool.

An order was given by the Chief Mate to the Bos'n to raise this boat before I started this operation. [Rep. Tr. 17-18.]

On the day of the accident I lost my thumb. We had been to Buckner Bay and returned to the vessel and the Bos'n appointed men to stay in the boat, men to man

the winches and the proceedings for raising the boat were immediately begun. He said "Heder, take the starboard niggerhead. Curley, take the port," and he named the hatch tenders. We went to our stations and as soon as the hatch tenders indicated, we started the winch. [Rep. Tr. 21.]

We took our turn and started heaving and followed the hatch tender's motion from then on. His hands were in motion at all times that the boat is in motion. If they want to go down, naturally they will change it. He has to motion where the boats can go. He indicated by his hands that the boat was stopped. There was a "stop heaving;" so I put my hand on to surge the lines. There is five lines that it was necessary "to throw them off, and at that speed, at the speed of the command or indication he gave, I had to do the operation quickly. So the first thing you do is to surge it with your hand and throw off your lines." I didn't throw them all off. I had at least four remaining on. I was surging. The line jumped, looped over my thumb, the first joint, and twisted it off in between the lines. [Rep. Tr. 23.]

I heard the Bos'n ask the Mate "Why not lead the boat falls to the No. 4 winch instead of the after niggerhead." I don't know of any reply made by the Mate. He just rebuked the suggestion.

Before raising this particular boat there had been similar discussions between the Bos'n and the Chief Mate regarding the manner in which they raised this boat. I heard similar discussions. I was always near the Bos'n. He liked me to be on that niggerhead, and for some reason I was always stationed there. I did hear several times that the Bos'n wanted to change the affair "so that there wouldn't be all these men needed to operate

the boat so that some could go to chow and others could work.”

The manner in which the boat could have been raised with the No. 4 winch drum would have been the same. The boat would have raised the same way, except that it would have been a faster operation with less line used and one man to operate the winch and one hatch tender to guide his actions. The winch handle would be the only operation to handle, nobody handling the lines at all except those who tie it off after the boat is two-blocked. If that operation were used it is not wholly correct to say there wouldn't be any surging of the lines at all or that no man would have to touch the lines. They would have to touch the line to fasten it on the boat, and they would have to tie it off. Where it is winding on the winch, somebody would touch the line. [Rep. Tr. 26-29.]

My thumb was between two lines, but it was pressed down towards the niggerhead, the surface of the metal with the action of the rope. I don't know if I had five turns around this niggerhead at all times. I was continually taking it off and putting it on. It was an average of about five turns. When I got the order to surge I don't think I took off some of the turns. [Rep. Tr. 32.]

NOTE: During the cross-examination of appellant, the witness illustrated his testimony by a demonstration for the purpose of showing the trial judge what happened and how it happened. This demonstration, of necessity, must remain a mystery in so far as this Honorable Court is concerned but, nevertheless, it must be presumed in an appellate court that the demonstration furnishes substantial support for the finding of the court that there was a

failure of proof of negligence on the part of the appellee. [Rep. Tr. 34, lines 13 to 36, line 1.]

In performing this operation, that is in the manner in which I chose to do it, I relied on my own judgment, and what I was taught at the Maritime School on Catalina Island. No officer on board this particular vessel told me to put my hand on ~~top~~ of the line when I was going to surge it. [Rep. Tr. 36.]

The appellee offered in evidence the deposition of Thomas F. Gresham, the master. This deposition is contained in the Apostles on Appeal, pages 48 to 69.

The master testified that: In operating a niggerhead, in good seamanship, one never places one's hand near a line around a niggerhead where there is about to be a strain. You should stay at least two to three feet away from the niggerhead. If necessary to surge, turns should be backed off and the line slacked with one or two turns where there is no strain, particularly when there is a possibility of a strain coming on the line, and that in order to take off turns of line which may be around the niggerhead it is not necessary for the man doing that operation to touch the niggerhead at all or to put his hand on top of the rope while it is on the niggerhead and in order to accomplish that operation in good and careful seamanship he would have the hauling part in his right hand, which he would merely throw the turns off, reaching outside the niggerhead thus, in a circular motion and that could be done without getting close enough to the niggerhead to get your hand caught in it, or anything of that kind.

"Q. Well, now, is there any reason why a line should not be wrapped around the winch drum in

an operation such as was being conducted on the day of the accident?

“A. Oh, this particular winch, there was no need for the drum and the drum is greased, and the manila is never taken to the drum. The niggerhead is purposely designed to handle manila rope.”

That is the kind of line they were using for this operation. The drum is designed to handle wire cable. It would not be practicable to use a wire ~~cable~~^{cable} for the purpose of hoisting the small boats aboard, or lowering them into the water, on this type of boat fall. This boat fall equipment is inspected by the U. S. Steamboat inspectors and are laid down according to their specifications. It was necessary to use the manila line. (Ap. 53-54.)

Basing my answer on my experience at sea, the manner in which the chief mate rigged these lines or ordered them rigged was in accordance with the standards of good seamanship. The accident was due to the carelessness of the injured in practicing poor seamanship in placing his hand on the niggerhead. Even a poor sailor working around a niggerhead would never put his hand anywhere near a niggerhead when it is moving because it is dangerous to put your hand on any moving machinery. (Ap. 55-56.)

I have seen a few seamen put their hands on rope that is being turned by a niggerhead, in order to hold that rope and keep it from moving with the niggerhead, but they didn't hold their fingers there long. They usually were broken of the habit.

I do not think that if this line had five loops around that niggerhead, that it would be possible to surge the

line quickly by means of slacking it back. You couldn't surge it in that manner if there were five loops around it; you should take at least three to four off. (Ap. 64.)

The foregoing testimony demonstrates that the findings made by the Honorable trial judge are fully supported by the evidence and that the final decree dismissing the libel on the merits was and is fully justified.

Conclusion.

Appellee contends that there is no legal ground upon which the decree of the District Court should be interfered with and that it should be affirmed.

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LASHER B. GALLAGHER,
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No. 11768

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TREASURE COMPANY, a corporation, and
SAMARKAND OIL COMPANY, a corporation,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

DEC 10 1947

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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In the District Court of the United States in and for the
Southern District of California
Central Division

No. 2454-B Civil

UNITED STATES OF AMERICA, for the use of
RECONSTRUCTION FINANCE CORPORA-
TION, a Federal Corporation, acting in behalf of
DEFENSE PLANT CORPORATION, a Federal
Corporation,

Plaintiff,

vs.

CERTAIN PARCELS OF LAND IN THE CITY OF
LOS ANGELES, COUNTY OF LOS ANGELES,
STATE OF CALIFORNIA; CITY OF LOS AN-
GELES, a municipal corporation; COUNTY OF
LOS ANGELES, a body politic and corporate;
STATE OF CALIFORNIA, a corporation sove-
reign; ASSOCIATED LAND OWNERS, INC., a
corporation; DOE ONE to DOE TWO THOU-
SAND, inclusive; ONE DOE CORPORATION; a
corporation, to FIVE HUNDRED DOE CORPO-
RATION, a corporation, inclusive; ONE A DOE
to TWO HUNDRED A DOE, inclusive, as the
Executors or Administrators, respectively, of the
Estates of One B Doe, Deceased, to Two Hundred B.
Doe, Deceased, inclusive; ONE DOE COMPANY,
a co-partnership, to FIVE HUNDRED DOE COM-
PANY, a co-partnership, inclusive; UNKNOWN
PERSONS, being all persons, firms, corporations,
public or private, having, or claiming to have, any
right, title, interest or claim in or to the hereinafter
described premises,

Defendants.

To the Honorable, the United States District Court:

Comes now the plaintiff, United States of America, on behalf, for the use, and at the request of Reconstruction Finance Corporation, by Leo V. Silverstein, United States Attorney for the Southern District of California, Irl D. Brett, Special Assistant to the Attorney General, and Frederick H. Steinmetz, Special Attorney, Lands Division, Department of Justice, as its attorneys, on application of the duly authorized officer of the United States, hereinafter referred to as the "Requesting Officer," and under the direction and by authority of the Attorney General of the United States, for cause of action against the above named defendants, and each of them, complains and alleges:

I.

That the plaintiff is entitled to acquire, by the exercise of its power of eminent domain, the property hereinafter described, for the uses and purposes hereinafter set forth.

II.

That in accordance with the provisions of the statutes hereinafter set forth, said Requesting Officer, for and in behalf of the United States, has designated and determined the property hereinafter described is suitable and necessary for the purposes of the United States, and has selected such property for acquisition by the United States in these proceedings, and said selection, designation, and determination ever since have been and now are in full force and effect; that the purposes for which the plaintiff is taking said property as hereinafter alleged are necessary and constitute a public use, which use is authorized by law; that the acquisition thereof by plaintiff is, and

will be, of greatest public benefit and to the least private injury; that plaintiff is informed and believes, and upon such information and belief alleges, that no part of said property has heretofore been appropriated to any public use, and if any part or portion thereof has heretofore been appropriated to a public use, the use to which said property is herein sought to be condemned and appropriated is a more necessary and paramount public use. [3]

III.

That plaintiff is informed and believes, and upon such information and belief alleges, that the parcels of property hereinafter described constitute the whole of various parcels, and not parts thereof.

IV.

That plaintiff has named herein by their true names, or by fictitious names, all defendants known by it to have some interest in said property; that there may be other persons having some interests therein whom the plaintiff hereby identifies as unknown persons, and makes such unknown persons defendants herein, to the end that said property may be vested in the United States of America to the extent hereinafter prayed for.

V.

That the defendants Doe One to Doe Two Thousand, inclusive, defendants One Doe Corporation to Five Hundred Doe Corporation, inclusive, defendants One Doe Company to Five Hundred Doe Company, inclusive, and defendants One A Doe to Two Hundred A Doe, inclusive, as the Executors or Administrators, respectively, of the Estates of One B Doe, Deceased, to Two Hundred B Doe,

Deceased, inclusive, are each sued or named herein under the fictitious names above set out, for the reason that plaintiff is ignorant of the true names of said defendants or decedents; that when the true names of said defendants or decedents, or any of them, are discovered, plaintiff will amend accordingly, the pleadings or proceedings herein.

That One Doe Corporation to Five Hundred Doe Corporation, inclusive, are corporations organized and existing under the laws of one of the states of the United States; that One Doe Company to Five Hundred Doe Company, are co-partnerships duly organized and existing, each one of which is composed of two or more co-partners; that One A Doe to Two Hundred A Doe, inclusive, are, respectively, the duly appointed, qualified and acting Administrators or Executors of the Estates of One B Doe, Deceased, to Two Hundred B Doe, Deceased, inclusive.

VI.

That this action is brought by the plaintiff under the authority of [4] and in accordance with sub-paragraph (5) of Section No. 5d of the Reconstruction Finance Corporation Act (15 U. S. C. 601-617) as amended by the Act of Congress approved March 27, 1942 (Public Law 507, 77th Congress), and Executive Order 9217, issued by the President of the United States on August 7, 1942, which Acts and Executive Order authorize the Reconstruction Finance Corporation to acquire and dispose of property deemed necessary for military, naval or other war purposes; that the public use for which the property hereinafter described is sought to be taken is the establishment of a reservoir for the storing and conservation of natural gas.

VII.

That the "Requesting Officer" hereinbefore mentioned is Leo Neilson, Assistant Secretary of the Reconstruction Finance Corporation, an agency of the United States. That by letter to the Attorney General of the United States, dated September 19, 1942, said Requesting Officer requested the institution of this proceeding, for the purposes hereinabove and hereafter designated, on behalf of the Defense Plant Corporation, a Federal corporation, which is wholly owned and controlled by the above mentioned Reconstruction Finance Corporation.

[Written in margin]: Amended by Order 7-4-43 JAC

VIII.

That the defendants City of Los Angeles, a municipal corporation, County of Los Angeles, a body politic and corporate, State of California, a corporation sovereign, Doe One to Doe Two Thousand, inclusive, One Doe Corporation, a corporation, to Five Hundred Doe Corporation, a corporation, inclusive, One A Doe to Two Hundred A Doe, inclusive, as the Executors or Administrators, respectively, of the Estates of One B Doe, Deceased, to Two Hundred B Doe, Deceased, inclusive, One Doe Company, a co-partnership, to Five Hundred Doe Company, a co-partnership, inclusive, and Unknown Persons, each claims some right, title, interest, or lien to, in, or upon the property hereinafter described, or some part thereof, the exact nature of which such claim or claims is unknown to plaintiff.

IX.

That the estate or interest in the property hereinafter described which plaintiff, by this action, intends and seeks

to take, acquire, condemn, [5] hold and own is the full fee simple title, subject, however, to existing easements for public utilities.

X.

That the property hereinabove mentioned, which is to be taken and condemned in this action, consists of those certain lots, pieces or parcels of land situated in the County of Los Angeles, State of California, described as follows, to wit:

PARCEL ONE

That part of Tract No. 9809 as shown on map recorded in Book 145 of Maps, at pages 91 to 96, inclusive, in the office of the County Recorder of Los Angeles County covering:

Lots 7 to 14, inclusive, in Block 7; Lots 3 to 25, inclusive, in Block 8; all of Block 9; Lots 1 to 20, inclusive, in Block 10; all of Block 11; all of Block 12; all of Block 13; all of Block 14; all of Block 15; Lots 1 to 13, inclusive, and Lots 25 and 26 in Block 16; Lots 1 to 13, inclusive, and Lots 23 to 26, inclusive, in Block 17; Lots 12 to 21, inclusive, in Block 18; all of Block 19; all of Block 20; all of Block 21; all of Block 22; all of Block 23; all of Block 24; all of Block 25; all of Block 26; Lots 13 to 27, inclusive, in Block 27; all of Block 28; all of Block 29; all of Block 30; Lots 4 to 9, inclusive, in Block 31; all of Block 32; Lots 3 to 41, inclusive, in Block 33; Lots 17 to 51, inclusive, in Block 34; Lots 12 to 18, inclusive, in Block 35; Lots 40 to 53, inclusive, and Lot 114 in Block 36.

PARCEL TWO

That part of Tract No. 9578, as shown on map recorded in Book 173 of Maps, at pages 32 and 33, in the office of the County Recorder of Los Angeles County covering:

Lots, 1, 14, 15 and 16 in Block 1, Lots 1 to 4, inclusive, and Lots 25 and 26 in Block 4; Lot 1 in Block 5; Lots 1 to 8, [6] inclusive, and Lots 10 to 16, inclusive, in Block 6; Lots 1 to 16, inclusive, in Block 7; and all of Block 8.

PARCEL THREE

That part of Tract No. 9167, as shown on map recorded in Book 172 of Maps, at pages 46 to 49, inclusive, in the office of the County Recorder of Los Angeles County covering:

Lots 1 to 20, inclusive, and Lots 34 to 55, inclusive, in Block 9; Lots 1 to 8, inclusive, in Block 10; and all of Block 13.

PARCEL FOUR

That part of the resubdivision of part of Port Ballona and part of Wicks Addition, as shown on map recorded in Book 43 of Miscellaneous Records, at page 76, in the office of the County Recorder of Los Angeles County, covering the Northwesterly one-half ($\frac{1}{2}$) of Block 67 and that part of said resubdivision of part of Port Ballona and part of Wicks Addition, as shown on map recorded in Book 43 of Miscellaneous Records, at page 79, in the office of the County Recorder of Los Angeles County, covering all of Block 78.

PARCEL FIVE

Beginning at the intersection of the center line of Playa Street, as vacated by Order of the Board of Supervisors April 10th, 1905, with the center line of the 60 foot strip of land described in deed to Los Angeles Pacific Company, recorded in Book 3805, at page 107 of Deeds; thence along the center line of Playa Street, as vacated, South $61^{\circ} 20'$ West, 1890 feet, thence North $28^{\circ} 40'$ West 280 feet; thence North $61^{\circ} 20'$ East 2290 feet, thence South $28^{\circ} 40'$ East 280 feet, more or less, to the center line of Jefferson Street, (formerly Playa Street), thence South $61^{\circ} 20'$ West [7] along the center line of Jefferson Street 400 feet to the point of beginning.

Excepting Therefrom that portion included in the 60 foot strip of land conveyed to Los Angeles Pacific Company by Clause 1 in Deed recorded in Book 3805, page 107 of Deed Records of Los Angeles County, California. Containing 14.1 acres, more or less.

PARCEL SIX

Beginning at the intersection of the center line of Playa Street, as vacated by Order of the Board of Supervisors April 10th, 1905, with the center line of the 60 foot strip of land described in deed to Los Angeles Pacific Company, recorded in Book 3805, at page 107 of Deeds; thence along the center line of Playa Street, as vacated, South $61^{\circ} 20'$ West 1890 feet; thence South $28^{\circ} 40'$ East 388 feet; thence North $61^{\circ} 20'$ East 990 feet; thence South $28^{\circ} 40'$ East 635 feet; thence South $61^{\circ} 20'$ West 335 feet; thence South $28^{\circ} 40'$ East 475 feet, more or less, to the south line of the Rancho La Ballona; thence

along said Ranch line North 82° East 90 feet, more or less, to a point established as Station 19 of the Rancho La Ballona by proceedings had in Case No. 20065 of the Superior Court; thence North 52° East 990 feet to Station 18; thence North $82^{\circ} 30'$ East 462 feet to Station 17; thence North $60^{\circ} 45'$ East 1386 feet to Station 16; thence North $27^{\circ} 45'$ East 160 feet; thence North $28^{\circ} 40'$ West 1080 feet; thence South $61^{\circ} 20'$ West 235 feet; thence North $28^{\circ} 40'$ West 155 feet; thence South $61^{\circ} 20'$ West 430 feet; thence North $28^{\circ} 40'$ West 180 feet, more or less, to the center of Jefferson Street, (formerly Playa Street); thence South $61^{\circ} 20'$ West along the center line of Jefferson Street 1105 feet, more or less, to the point of beginning. [8]

Excepting Therefrom that portion included in the 60 foot strip of land conveyed to Los Angeles Pacific Company by Clause 1 in Deed recorded in Book 3805, page 107 of Deed Records of Los Angeles County, California. Containing 97.38 acres, more or less.

PARCEL SEVEN

That portion of the 60 foot strip of land conveyed to Los Angeles Pacific Company by Clause 1 in Deed recorded in Book 3805, page 107 of Deed Records of Los Angeles County, extending North $33^{\circ} 52' 30''$ East 452 feet and extending South $33^{\circ} 52' 30''$ West 1008 feet from the intersection of the center line of Playa Street, as vacated by Order of the Board of Supervisors April 10th, 1905, with the center line of said 60 foot strip of land described in said deed to Los Angeles Pacific Company; said distances measured along the center line

of said 60 foot strip; the southwesterly boundary of said 60 foot strip being a line bearing North 28° 40' West and the Northeasterly boundary thereof being a line bearing South 28° 40' East; containing 2.02 acres, more or less.

XI.

That the urgency for obtaining immediate possession and exclusive use and control of the property herein sought to be taken is such that plaintiff has not been able to procure accurate information as to the various ownerships of the above described parcels of land; and for such reason plaintiff is not able to allege the names of the owners and claimants separately claiming interests in such separate parcels; that the defendants named in the caption of this complaint by true names are apparent and presumptive owners of some part or portion of the property herein sought to be acquired, and that the defendants herein sued under fictitious names claim some right, title or interest in or to said property, or some part thereof; that plaintiff intends to and will prepare and file an amended complaint, setting forth said separate ownerships [9] and true names where ascertained, and prays leave of court to prepare, serve and file such amended complaint when the necessary information has been obtained by it.

XII.

That the defendant State of California is a corporation sovereign; that the defendant County of Los Angeles is a body politic, organized and existing under and by virtue of the laws of the State of California; that the defendant City of Los Angeles is a municipal corporation, organized and existing under and by virtue of the laws of the State of California.

XIII.

That under the provisions of the Second War Powers Act of 1942, approved March 27, 1942 (Public Law 507, 77th Congress), it is provided, in part, as follows:

“Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used and improved for the purposes of the Act notwithstanding any other law;” that by reason thereof the United States is entitled to immediate possession and use of the property herein sought to be condemned;

That the Assistant Secretary of the Reconstruction Finance Corporation, in a letter dated September 19, 1942, mentioned in Paragraph VII of this complaint, stated, in part, that it is vital to the successful prosecution of the war that the United States be granted the immediate right of possession of the hereinabove described property, and requested the securing by the United States of such right of immediate possession.

Wherefore, plaintiff prays judgment:

1. That the Court ascertain and assess the value of the property herein sought to be taken and condemned, and of each and every separate estate or interest therein;
2. Adjudging that the public uses for which plaintiff takes and condemns said lands are necessary public uses of the plaintiff, and that the uses to which said property are to be applied are uses authorized by law, and that all of the said lands so taken are necessary thereto; [10]
3. Vesting in the United States of America full fee simple title to the lands hereinbefore described, subject, however, to existing easements for public utilities, and

adjudging that said lands shall be deemed to be condemned and taken for the use of the United States for the purposes and uses hereinbefore set forth; and further adjudging that the right to just compensation for the lands hereinbefore described be vested in the persons entitled thereto as their respective interests may appear and be established by judgment herein;

4. That an Order issue from this Court vesting the right to immediate possession in the plaintiff of the lands hereinbefore described and sought to be condemned in this action, and directing all parties in possession thereof to forthwith yield up possession of the same to the plaintiff;

5. That all liens or encumbrances of record against the property herein sought to be taken and condemned be satisfied out of the award to be made in this proceeding;

6. For such other and further relief as the Court deems meet and proper in the premises and as the nature of the case may require.

Dated: This 28 day of September, 1942.

LEO V. SILVERSTEIN

United States Attorney

IRL D. BRETT

Special Assistant to the
Attorney General

FREDERICK H. STEINMETZ

Special Attorneys, Lands Division,
Department of Justice

By *c* Frederick H. Steinmetz
Attorneys for Plaintiff

[Stamped]: Complaint Amended: 1st date: Jan. 12, 1944.

[Endorsed]: Filed Sep. 28, 1942. [11]

[Title of District Court and Cause]

ORDER FOR IMMEDIATE POSSESSION

Upon a reading of the complaint in the above entitled action, and upon application of Frederick H. Steinmetz, Special Attorney, Lands Division, Department of Justice, for an order granting immediate possession of the property described in said complaint, pursuant to the Second War Powers Act of 1942, approved March 27, 1942 (Public Law 507—77th Congress); and upon the testimony in open Court of George H. Pannell, Appraiser for Defense Plant Corporation, and Paul M. Lee, Examiner for Reconstruction Finance Corporation, and good cause appearing therefor:

It Is Hereby Ordered, Adjudged and Decreed that plaintiff, United States of America, is hereby granted the immediate possession of all of the hereinafter described property, excepting only those respective portions of the following lots occupied by the following persons or agencies: [12]

- a. Residence of Mrs. Coppinger, at 8116 Delganey Avenue, Los Angeles, on Lot 16, Block 33, of Tract No. 9809, hereinafter described;
- b. Pumping Plant and Reservoir of Palisades Del Rey Water Company, a corporation, on Lot 7, Block 15, of said Tract 9809;
- c. Transformer Station of Bureau of Power and Light of the City of Los Angeles, located on Lots 1-6, inclusive, of Block 15, in said Tract 9809.

The property affected by this Order is more particularly described as follows: [13]

Those certain lots, pieces or parcels of land situated in the County of Los Angeles, State of California, described as follows, to-wit:

PARCEL ONE

That part of Tract No. 9809 as shown on map recorded in Book 145 of Maps, at pages 91 to 96, inclusive, in the office of the County Recorder of Los Angeles County covering:

Lots 7 to 14, inclusive, in Block 7; Lots 3 to 25, inclusive, in Block 8; all of Block 9; Lots 1 to 20, inclusive, in Block 10; all of Block 11; all of Block 12; all of Block 13; all of Block 14; all of Block 15; Lots 1 to 13, inclusive, and Lots 25 and 26 in Block 16; Lots 1 to 13, inclusive, and Lots 23 to 26, inclusive, in Block 17; Lots 12 to 21, inclusive, in Block 18; all of Block 19; all of Block 20; all of Block 21; all of Block 22; all of Block 23; all of Block 24; all of Block 25; all of Block 26; Lots 13 to 27, inclusive, in Block 27; all of Block 28; all of Block 29; all of Block 30; Lots 4 to 9, inclusive, in Block 31; all of Block 32; Lots 3 to 41, inclusive, in Block 33; Lots 17 to 51, inclusive, in Block 34; Lots 12 to 18, inclusive, in Block 35; Lots 40 to 53, inclusive, and Lot 114 in Block 36.

PARCEL TWO

That part of Tract No. 9578, as shown on map recorded in Book 173 of Maps, at pages 32 and 33, in the office of the County Recorder of Los Angeles County covering:

Lots 1, 14, 15 and 16 in Block 1, Lots 1 to 4, inclusive, and Lots 25 and 26 in Block 4; Lot 1 in

Block 5; Lots 1 to 8, inclusive, and Lots 10 to 16, inclusive, in Block 6; Lots 1 to 16, inclusive, in Block 7; and all of Block 8. [14]

PARCEL THREE

That part of Tract No. 9167, as shown on map recorded in Book 172 of Maps, at pages 46 to 49, inclusive, in the office of the County Recorder of Los Angeles County covering:

Lots 1 to 20, inclusive, and Lots 34 to 55, inclusive, in Block 9; Lots 1 to 8, inclusive, in Block 10; and all of Block 13.

PARCEL FOUR

That part of the resubdivision of part of Port Ballona and part of Wicks Addition, as shown on map recorded in Book 43 of Miscellaneous Records, at page 76, in the office of the County Recorder of Los Angeles County, covering the Northwesterly one-half ($\frac{1}{2}$) of Block 67 and that part of said resubdivision of part of Port Ballona and part of Wicks Addition, as shown on map recorded in Book 43 of Miscellaneous Records, at page 79, in the office of the County Recorder of Los Angeles County, covering all of Block 78.

PARCEL FIVE

Beginning at the intersection of the center line of Playa Street, as vacated by Order of the Board of Supervisors April 10th, 1905, with the center line of the 60 foot strip of land described in deed to Los Angeles Pacific Company, recorded in Book 3805, at page 107 of Deeds; thence along the center

line of Playa Street, as vacated, South $61^{\circ} 20'$ West, 1890 feet, thence North $28^{\circ} 40'$ West 280 feet; thence North $61^{\circ} 20'$ East 2290 feet, thence South $28^{\circ} 40'$ East 280 feet, more or less, to the center line of Jefferson Street, (formerly Playa Street); thence South $61^{\circ} 20'$ West along the center line of Jefferson Street 400 feet to the point of beginning.

Excepting Therefrom that portion included in the 60 [15] foot strip of land conveyed to Los Angeles Pacific Company by Clause 1 in Deed recorded in Book 3805, page 107 of Deed Records of Los Angeles County, California. Containing 14.1 acres, more or less.

PARCEL SIX

Beginning at the intersection of the center line of Playa Street, as vacated by Order of the Board of Supervisors April 10th, 1905, with the center line of the 60 foot strip of land described in deed to Los Angeles Pacific Company, recorded in Book 3805, at page 107 of Deeds; thence along the center line of Playa Street, as vacated, South $61^{\circ} 20'$ West 1890 feet; thence South $28^{\circ} 40'$ East 388 feet; thence North $61^{\circ} 20'$ East 990 feet; thence South $28^{\circ} 40'$ East 635 feet; thence South $61^{\circ} 20'$ West 335 feet; thence South $28^{\circ} 40'$ East 475 feet; more or less, to the south line of the Rancho La Ballona; thence along said Ranch line North 82° East 90 feet, more or less, to a point established as Station 19 of the Rancho La Ballona by proceedings had in Case No. 20065 of the Superior Court; thence North 52° East 990 feet to Station 18; thence North $82^{\circ} 30'$ East 462 feet to Station 17; thence North

60° 45' East 1386 feet to Station 16; thence North 27° 45' East 160 feet; thence North 28° 40' West 1080 feet; thence South 61° 20' West 235 feet; thence North 28° 40' West 155 feet; thence South 61° 20' West 430 feet; thence North 28° 40' West 180 feet, more or less, to the center of Jefferson Street, (formerly Playa Street); thence South 61° 20' West along the center line of Jefferson Street 1105 feet, more or less, to the point of beginning.

Excepting Therefrom that portion included in the 60 foot strip of land conveyed to Los Angeles Pacific Company by Clause 1 in Deed recorded in Book 3805, page 107 of Deed Records of Los Angeles County, California. Containing 97.38 acres, more or less. [16]

PARCEL SEVEN

That portion of the 60 foot strip of land conveyed to Los Angeles Pacific Company by Clause 1 in Deed recorded in Book 3805, page 107 of Deed Records of Los Angeles County, extending North 33° 52' 30" East 452 feet and extending South 33° 52' 30" West 1008 feet from the intersection of the center line of Playa Street, as vacated by Order of the Board of Supervisors April 10th, 1905, with the center line of said 60 foot strip of land described in said deed to Los Angeles Pacific Company; said distances measured along the center line of said 60 foot strip; the southwesterly boundary of said 60 foot strip being a line bearing North 28° 40' West and the Northeasterly boundary thereof being a line bearing South 28° 40' East; containing 2.02 acres, more or less.

It Is Further Ordered that copies of this Order shall be delivered to each of the persons or agencies hereinabove specifically mentioned, and that the United States Marshal shall forthwith post in a conspicuous place upon each of the oil derricks and tanks within the above described area, a notice, substantially as follows:

“NOTICE

To All It May Concern:

Under the Second War Purposes Act, this property is taken by the United States of America for war purposes.

You enter upon this property at your own hazard.

UNITED STATES OF AMERICA
BY DEFENSE PLANT CORPORATION”

Dated this 28th day of September, 1942, at 11:44 o'clock A. M.

C. E. BEAUMONT

United States District Judge [17]

Presented by:

LEO V. SILVERSTEIN

United States Attorney

IRL D. BRETT

Special Assistant to the Attorney General

FREDERICK H. STEINMETZ

Special Attorney, Lands Division,
Department of Justice

By Frederick H. Steinmetz

Attorneys for Plaintiff

[Endorsed]: Filed Sep. 28, 1942. [18]

[Title of District Court and Cause]

DECLARATION OF TAKING NO. 1

To the Honorable, The United States District Court:

For and on behalf of Reconstruction Finance Corporation, a corporation duly created by the United States of America, pursuant to 47 Stat., Chapter 8, Pages 5-12, approved January 22, 1932 (15 U. S. C. 601-617), as amended, it is hereby declared that:

1. The lands hereinafter described are hereby taken in the name of United States of America, your petitioner, for the purposes hereinafter stated, under and in accordance with sub-paragraph (5) of Section 5d of the Reconstruction Finance Corporation Act (15 U. S. C. 601-617) as amended by the Act of Congress, approved March 27, 1942 (Public Law 506, Seventy-seventh Congress, 15 U. S. C. 606 b) which amendatory act authorized the acquisition of land in the name of United States of America. petitioner herein, upon application of Reconstruction Finance Corporation, pursuant to the provisions of the Act approved August 1, 1888 (25 Stat. 357) as amended, and Sections 1, 2 and 4 of the Act approved February 26, 1931 (46 Stat. 1421) as amended. [19]

2. It has been determined to be necessary and advantageous to the carrying out of the authority vested by Reconstruction Finance Corporation in Defense Plant Corporation, a corporation created pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended (47 Stat., Chapter 8, Pages 5-12) to acquire the lands hereinafter described, in order to provide facilities for the storage of natural gas; and

3. A general description of the lands being taken is set forth in Exhibit "A", attached hereto and made a part

hereof, and is a description of a portion of the lands described in the petition filed in the above entitled cause.

4. A plat showing the lands taken is attached hereto and made a part hereof, and is designated Exhibit "B".

5. The estate taken for said public uses is the absolute fee simple title thereto, subject, however, to existing easements for public utilities.

6. The sum estimated by Reconstruction Finance Corporation as just compensation for said lands with all buildings and improvements thereon and all appurtenances thereto, and including all interests hereby taken in said lands is fully set forth in Exhibit "A", attached hereto and made a part hereof, which sum has been duly authorized to be deposited, and the said sum herewith is deposited in the Registry of this Honorable Court, for the use and benefit of the persons entitled thereto.

In Witness Whereof, the petitioner has caused this declaration to be signed in its name by Reconstruction Finance Corporation, which has duly secured the executing of this declaration by its Assistant Treasurer, and its Assistant corporate seal to be affixed, and be duly attested by its Secretary pursuant to authorization by the Board of Directors, this 22nd day of October, 1942, in the City of Washington, District of Columbia.

(Seal)

RECONSTRUCTION FINANCE
CORPORATION

By H. L. Sullivan

Assistant Treasurer

Attest:

By [Illegible]

Assistant Secretary [20]

EXHIBIT "A"

The lands which shall be the subject matter of this Declaration of Taking are situated in the City of Los Angeles, State of California, and are more fully described as follows:

PARCEL ONE:

That part of Tract No. 9809 as shown on map recorded in Book 145 of Maps, at pages 91 to 96, inclusive, in the office of the County Recorder of Los Angeles County covering:

Lots 7 to 14, inclusive, in Block 7; Lots 3 to 25, inclusive, in Block 8; all of Block 9; Lots 1 to 20, inclusive, in Block 10; all of Block 11; all of Block 12; all of Block 13; all of Block 14; all of Block 15; Lots 1 to 13, inclusive, and Lots 25 and 26 in Block 16; Lots 1 to 13, inclusive, and Lots 23 to 26, inclusive, in Block 17; Lots 12 to 21, inclusive, in Block 18; all of Block 19; all of Block 20; all of Block 21; all of Block 22; all of Block 23; all of Block 24; all of Block 25; all of Block 26; Lots 13 to 27, inclusive, in Block 27; all of Block 28; all of Block 29; all of Block 30; Lots 4 to 9, inclusive, in Block 31; all of Block 32; Lots 3 to 41, inclusive, in Block 33; Lots 17 to 51, inclusive, in Block 34; Lots 12 to 18, inclusive, in Block 35; Lots 40 to 53, inclusive, and Lot 114 in Block 36.

Excepting Therefrom (1) pumping plant and reservoir of Palisades Del Rey Water Company, a cor-

15 OK FML

poration, on Lot 7, Block 16 of said Tract 9809; (2) transformer station of Bureau of Power and Light

of the City of Los Angeles, located on Lots 1-6, inclusive, of Block 15 in said Tract 9809.

PARCEL TWO:

That part of Tract No. 9578, as shown on map recorded in Book 173 of Maps, at pages 32 and 33, in the office of the County Recorder of Los Angeles County covering:

Lots 1, 14, 15 and 16 in Block 1, Lots 1 to 4, inclusive, and Lots 25 and 26 in Block 4; Lot 1 in Block 5; Lots 1 to 8, inclusive, and Lots 10 to 16, inclusive, in Block 6; Lots 1 to 16, inclusive, in Block 7; and all of Block 8.

PARCEL THREE:

That part of Tract No. 9167, as shown on map recorded in Book 172 of Maps, at pages 46 to 49, inclusive, in the office of the County Recorder of Los Angeles County covering:

Lots 1 to 20, inclusive, and Lots 34 to 55, inclusive, in Block 9; Lots 1 to 8, inclusive, in Block 10; and all of Block 13.

Excepting Therefrom the north outfall sewer ventilating station No. 2 of the City of Los Angeles, located on Lot 13 of said Tract 9167.

PARCEL FOUR:

That part of the resubdivision of part of Port Ballona and part of Wicks Addition, as shown on map recorded in Book 43 of Miscellaneous Records, at page 76, in the office of the County Recorder of Los Angeles County, covering the Northwesterly one-

half ($\frac{1}{2}$) of Block 67 and that part of said re-subdivision of part of Port Ballona and part of Wicks Addition, as shown on map recorded in Book 43 of Miscellaneous Records, at page 79, in the office of the County Recorder of Los Angeles County, covering all of Block 78. [21]

PARCEL FIVE:

Beginning at the intersection of the center line of Playa Street, as vacated by Order of the Board of Supervisors April 10th, 1905, with the center line of the 60 foot strip of land described in deed to Los Angeles Pacific Company, recorded in Book 3805, at page 107 of Deeds; thence along the center line of Playa Street, as vacated, South $61^{\circ} 20'$ West, 1890 feet, thence North $28^{\circ} 40'$ West 280 feet; thence North $61^{\circ} 20'$ East 2290 feet, thence South $28^{\circ} 40'$ East 280 feet, more or less, to the center line of Jefferson Street, (formerly Playa Street); thence South $61^{\circ} 20'$ West along the center line of Jefferson Street 400 feet to the point of beginning.

Excepting Therefrom that portion included in the 60 foot strip of land conveyed to Los Angeles Pacific Company by Clause 1 in Deed recorded in Book 3805, page 107 of Deed Records of Los Angeles County, California. Containing 14.1 acres, more or less.

PARCEL SIX:

Beginning at the intersection of the center line of Playa Street, as vacated by Order of the Board of Supervisors April 10th, 1905, with the center line of the 60 foot strip of land described in deed to

Los Angeles Pacific Company, recorded in Book 3805, at page 107 of Deeds; thence along the center line of Playa Street, as vacated, South $61^{\circ} 20'$ West 1890 feet; thence South $28^{\circ} 40'$ East 388 feet; thence North $61^{\circ} 20'$ East 990 feet; thence South $28^{\circ} 40'$ East 635 feet; thence South $61^{\circ} 20'$ West 335 feet; thence South $28^{\circ} 40'$ East 475 feet; more or less, to the south line of the Rancho La Ballona; thence along said Ranch line North 82° East 90 feet, more or less, to a point established as Station 19 of the Rancho La Ballona by proceedings had in Case No. 20065 of the Superior Court; thence North 52° East 990 feet to Station 18; thence North $82^{\circ} 30'$ East 462 feet to Station 17; thence North $60^{\circ} 45'$ East 1386 feet to Station 16; thence North $27^{\circ} 45'$ East 160 feet; thence North $28^{\circ} 40'$ West 1080 feet; thence South $61^{\circ} 20'$ West 235 feet; thence North $28^{\circ} 40'$ West 155 feet; thence South $61^{\circ} 20'$ West 430 feet; thence North $28^{\circ} 40'$ West 180 feet, more or less, to the center of Jefferson Street, (formerly Playa Street); thence South $61^{\circ} 20'$ West along the center line of Jefferson Street 1105 feet, more or less, to the point of beginning.

Excepting Therefrom that portion included in the 60 foot strip of land conveyed to Los Angeles Pacific Company by Clause 1 in Deed recorded in Book 3805, page 107 of Deed Records of Los Angeles County, California. Containing 97.38 acres, more or less.

PARCEL SEVEN:

That portion of the 60 foot strip of land conveyed to Los Angeles Pacific Company by Clause 1 in Deed recorded in Book 3805, page 107 of Deed Records of Los Angeles County, extending North $33^{\circ} 52' 30''$ East 452 feet and extending South $33^{\circ} 52' 30''$ West 1008 feet from the intersection of the center line of Playa Street, as vacated by Order of the Board of Supervisors April 10th, 1905, with the center line of said 60 foot strip of land described in said deed to Los Angeles Pacific Company; said distances measured along the center line of said 60 foot strip; the southwesterly boundary of said 60 foot strip being a line bearing North $28^{\circ} 40'$ West and the Northeasterly boundary thereof being a line bearing South $28^{\circ} 40'$ East; containing 2.02 acres, more or less.

ESTIMATED JUST COMPENSATION:

Seven hundred forty thousand, four hundred sixty-nine dollars (\$740,469.00). [22]

[EXHIBIT B]

(Photostat)

[Endorsed]: Filed Oct. 26, 1942. [23]

TRACT

27 26

34 35

AREA OF
PLAYA DEL REY
GAS STORAGE RESERVOIR

EXHIBIT No. 1



In the District Court of the United States in and for the
Southern District of California

Central Division

No. 2454-B Civil

UNITED STATES OF AMERICA, for the use of
RECONSTRUCTION FINANCE CORPORA-
TION, a Federal Corporation, acting in behalf of
DEFENSE PLANT CORPORATION, a Federal
Corporation,

Plaintiff,

vs.

CERTAIN PARCELS OF LAND IN THE CITY OF
LOS ANGELES, COUNTY OF LOS ANGELES,
STATE OF CALIFORNIA; et al.,

Defendants.

DECREE ON DECLARATION OF TAKING NO. 1

Comes now the plaintiff, United States of America, by
Leo V. Silverstein, United States Attorney, Irl D. Brett,
Special Assistant to the Attorney General, and Frederick
H. Steinmetz, Special Attorney, Lands Division, Depart-
ment of Justice, and moves the Court to enter a Decree
vesting title in the United States of America in and to the
real property hereinafter described, and described in
Declaration of Taking No. 1 filed herein, being a portion
of the lands described in the Complaint in Condemnation
heretofore filed, together with all improvements thereon.

Thereupon the Court proceeds to hear and pass upon
said Motion, Complaint, and Declaration of Taking No.
1, and finds and decrees as follows:

First: That the United States is entitled to acquire
property by eminent domain for use in the establishment

of a reservoir for the storing and conservation of natural gas. [24]

Second: That a Complaint in Condemnation was filed at the request of the Assistant Secretary of the Reconstruction Finance Corporation, an agency of the United States, the authority empowered by law to acquire the lands described in said Complaint, and also under the direction of the Attorney General of the United States.

Third: That in said Complaint and Declaration of Taking No. 1, a statement of authority under which and the public use for which said lands are taken is set out.

Fourth: That a proper description of the lands sought to be taken, sufficient for the identification thereof, is set out in said Declaration of Taking No. 1.

Fifth: A statement of the estate or interest in said lands taken for said public use is set out in said Declaration of Taking No. 1.

Sixth: A plan showing the lands taken is annexed to and incorporated in said Declaration of Taking No. 1, and marked "Exhibit No. 1."

Seventh: A statement of the sum of money estimated by said acquiring authority to be just compensation for the lands taken, to wit: The sum of Seven Hundred Forty Thousand, Four Hundred Sixty-nine Dollars (\$740,469.00), is set out in said Declaration of Taking No. 1, and that said sum was deposited in the Registry of this Court coincident with the filing of said Declaration of Taking No. 1.

And the Court having fully considered said Condemnation Complaint and said Declaration of Taking No. 1, and the statutes in such case made and provided, is of the

opinion that the United States is entitled to take said property and have the title thereto vested in it, pursuant to the Act of Congress approved February 26, 1931 (46 Stat. 1421; Title 40, sec. 258a, U. S. C. A.).

It Is Therefore Ordered, Adjudged and Decreed:

The the title to the following described lands, including all buildings and improvements thereon, if any, and all appurtenances thereto, in fee simple absolute, subject only to existing easements for public utilities, be, and the same is hereby, vested in the United States of America, and said lands, [25] improvements, and appurtenances are deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto when said compensation shall be ascertained and awarded in this proceeding and established by judgment thereunder, pursuant to law.

The lands so condemned and taken are a portion of the lands described in the Complaint heretofore filed herein, and are situate, lying, and being in the City of Los Angeles, State of California, and are more fully described as follows:

PARCEL ONE

That part of Tract No. 9809 as shown on map recorded in Book 145 of Maps, at pages 91 to 96, inclusive, in the office of the County Recorder of Los Angeles County covering:

Lots 7 to 14, inclusive, in Block 7; Lots 3 to 25, inclusive, in Block 8; all of Block 9; Lots 1 to 20, inclusive, in Block 10; all of Block 11; all of Block 12; all of Block 13; all of Block 14; all of Block 15;

Lots 1 to 13, inclusive, and Lots 25 and 26 in Block 16; Lots 1 to 13, inclusive, and Lots 23 to 26, inclusive, in Block 17; Lots 12 to 21, inclusive, in Block 18; all of Block 19; all of Block 20; all of Block 21; all of Block 22; all of Block 23; all of Block 24; all of Block 25; all of Block 26; Lots 13 to 27, inclusive, in Block 27; all of Block 28; all of Block 29; all of Block 30; Lots 4 to 9, inclusive, in Block 31; all of Block 32; Lots 3 to 41, inclusive, in Block 33; Lots 17 to 51, inclusive, in Block 34; Lots 12 to 18, inclusive, in Block 35; Lots 40 to 53, inclusive, and Lot 114 in Block 36.

Excepting Therefrom (1) pumping plant and reservoir of Palisades Del Rey Water Company, a corporation, on Lot 7, Block 15 of said Tract 9809; (2) transformer station of Bureau of Power and Light of the City of Los Angeles, located on Lots 1-6, inclusive, of Block 15 in said Tract 9809. [26]

PARCEL TWO

That part of Tract No. 9578, as shown on map recorded in Book 173 of Maps, at pages 32 and 33, in the office of the County Recorder of Los Angeles County covering:

Lots 1, 14, 15 and 16 in Block 1, Lots 1 to 4, inclusive, and Lots 25 and 26 in Block 4; Lot 1 in Block 5; Lots 1 to 8, inclusive, and Lots 10 to 16, inclusive, in Block 6; Lots 1 to 16, inclusive, in Block 7; and all of Block 8.

PARCEL THREE

That part of Tract No. 9167, as shown on map recorded in Book 172 of Maps, at pages 46 to 49, inclusive, in the office of the County Recorder of Los Angeles County covering:

Lots 1 to 20, inclusive, and Lots 34 to 55, inclusive, in Block 9; Lots 1 to 8, inclusive, in Block 10; and all of Block 13.

Excepting Therefrom the north outfall sewer ventilating station No. 2 of the City of Los Angeles, located on Lot 13 of said Tract 9167.

PARCEL FOUR

That part of the resubdivision of part of Port Ballona and part of Wicks Addition, as shown on map recorded in Book 43 of Miscellaneous Records, at page 76, in the office of the County Recorder of Los Angeles County, covering the Northwesterly one-half ($\frac{1}{2}$) of Block 67 and that part of said resubdivision of part of Port Ballona and part of Wicks Addition, as shown on map recorded in Book 43 of Miscellaneous Records, at page 79, in the office of the County Recorder of Los Angeles County, covering all of Block 78.

PARCEL FIVE

Beginning at the intersection of the center line of Playa Street, as vacated by Order of the Board of Supervisors April 10th, 1905, with the center line of the 60 foot strip of land described in deed to [27] Los Angeles Pacific Company, recorded in Book 3805, at page 107 of Deeds; thence along the center

line of Playa Street, as vacated, South $61^{\circ} 20'$ West, 1890 feet, thence North $28^{\circ} 40'$ West 280 feet; thence North $61^{\circ} 20'$ East 2290 feet, thence South $28^{\circ} 40'$ East 280 feet, more or less, to the center line of Jefferson Street, (formerly Playa Street); thence South $61^{\circ} 20'$ West along the center line of Jefferson Street 400 feet to the point of beginning.

Excepting Therefrom that portion included in the 60 foot strip of land conveyed to Los Angeles Pacific Company by Clause 1 in Deed recorded in Book 3805, page 107 of Deed Records of Los Angeles County, California. Containing 14.1 acres, more or less.

PARCEL SIX

Beginning at the intersection of the center line of Playa Street, as vacated by Order of the Board of Supervisors April 10th, 1905, with the center line of the 60 foot strip of land described in deed to Los Angeles Pacific Company, recorded in Book 3805, at page 107 of Deeds; thence along the center line of Playa Street, as vacated, South $61^{\circ} 20'$ West 1890 feet; thence South $28^{\circ} 40'$ East 388 feet; thence North $61^{\circ} 20'$ East 990 feet; thence South $28^{\circ} 40'$ East 635 feet; thence South $61^{\circ} 20'$ West 335 feet; thence South $28^{\circ} 40'$ East 475 feet; more or less, to the south line of the Rancho La Ballona; thence along said Ranch line North 82° East 90 feet, more or less, to a point established as Station 19 of the Rancho La Ballona by proceedings had in Case No. 20065 of the Superior Court; thence North 52° East 990 feet to Station 18; thence North $82^{\circ} 30'$ East 462 feet to Station 17; thence North

60° 45' East 1386 feet to Station 16; thence North 27° 45' East 160 feet; thence North 28° 40' West 1080 feet; thence South 61° 20' West 235 feet; thence North 28° 40' West 155 feet; thence South 61° 20' West 430 feet; thence North 28° 40' West 180 feet, [28] more or less, to the center of Jefferson Street, (formerly Playa Street); thence South 61° 20' West along the center line of Jefferson Street 1105 feet, more or less, to the point of beginning.

Excepting Therefrom that portion included in the 60 foot strip of land conveyed to Los Angeles Pacific Company by Clause 1 in Deed recorded in Book 3805, page 107 of Deed Records of Los Angeles County, California. Containing 97.38 acres, more or less.

PARCEL SEVEN

That portion of the 60 foot strip of land conveyed to Los Angeles Pacific Company by Clause 1 in Deed recorded in Book 3805, page 107 of Deed Records of Los Angeles County, extending North 33° 52' 30" East 452 feet and extending South 33° 52' 30" West 1008 feet from the intersection of the center line of Playa Street, as vacated by Order of the Board of Supervisors April 10th, 1905, with the center line of said 60 foot strip of land described in said deed to Los Angeles Pacific Company; said distances measured along the center line of said 60 foot strip; the southwesterly boundary of said 60 foot strip being a line bearing North 28° 40' West and the Northeasterly boundary thereof being a line bearing South 28° 40' East; containing 2.02 acres, more or less.

It Is Further Ordered, Adjudged, and Decreed, that the possession by the United States of said lands heretofore taken under the Order for Immediate Possession rendered by this Court on September 28, 1942, at 11:44 a. m., is hereby continued.

This cause is held open for such other and further orders, judgments and decrees as may be necessary in the premises. [29]

Dated: This 26th day of October, 1942, at 4:45 o'clock, P. M.

C. E. BEAUMONT

United States District Judge

Presented by:

LEO V. SILVERSTEIN

United States Attorney

IRL D. BRETT

Special Assistant to the Attorney General

FREDERICK H. STEINMETZ

Special Attorney, Lands Division,

Department of Justice

By Frederick H. Steinmetz

Attorneys for Plaintiff

Judgment entered Oct. 26, 1942. Docketed Oct. 26, 1942 C. O. Book 12, page 39. Edmund L. Smith, Clerk; by R. B. Clifton, Deputy.

[Endorsed]: Filed Oct. 26, 1942. [30]

In the District Court of the United States in and for the
Southern District of California

Central Division

No. 2454-B Civil

UNITED STATES OF AMERICA, for the use of
RECONSTRUCTION FINANCE CORPORA-
TION, a Federal Corporation, acting in behalf of
DEFENSE PLANT CORPORATION, a Federal
Corporation,

Plaintiff,

vs.

* * * * *

SAMARKAND OIL COMPANY, a California corpo-
ration,

* * * * *

TREASURE COMPANY, LTD., a corporation,

* * * * *

Defendants.

FIRST AMENDED COMPLAINT [31]

Comes now the plaintiff, United States of America, and
upon leave of Court, first duly had and obtained, files
this, its First Amended Complaint, on behalf, and at the
request, of Reconstruction Finance Corporation, a Federal
corporation, by its duly authorized officer, hereinafter
referred to as the "Requesting Officer," and under the
direction and by the authority of the Attorney General of
the United States, and for cause of action against the
above named defendants and each of them, complains and
alleges:

I.

That the plaintiff is entitled, empowered and authorized to acquire by the exercise of the power of eminent domain, all of the property hereinafter described, for the uses and purposes hereinafter set forth.

II.

That pursuant to the provisions of the statutes hereinafter set forth the said Reconstruction Finance Corporation, by its said Requesting Officer for and in behalf of the United States, has determined that the property hereinafter described is suitable and necessary for the purposes of the United States, and has selected and designated such property for acquisition by the United States in these proceedings, and that said selection, designation, and determination ever since have been and now are, in full force and effect. That the purposes for which the plaintiff is taking said property, as hereinafter set forth, are necessary and constitute a public use, which use is authorized by law; that the acquisition of said property is and will be of greatest public benefit and to the least private injury; that plaintiff is informed and believes, and upon such information and belief alleges, that no part of said property has heretofore been appropriated to any public use; and, if any part or portion thereof has heretofore been so appropriated, the use to which said property is herein sought to be condemned and appropriated, is a more necessary and a paramount public use. [32]

III.

That plaintiff is informed and believes, and upon such information and belief alleges, that the property described under each parcel number as hereinafter set forth, constitutes the whole of the parcel and not a part or portion of a parcel. [33]

IV.

That plaintiff has named herein by their true names, or by fictitious names, all defendants known by it to have some interest in said property; that there may be other persons having some interests therein now unknown to plaintiff whom the plaintiff hereby designates as unknown persons, and makes such unknown persons defendants herein, and hereby prays leave of Court to bring any such unknown persons before the Court by service of process upon them if and when they are discovered to the end that title to all of said property may be vested in the United States of America to the extent hereinafter prayed for.

V.

That the defendants Doe One to Doe Two Thousand, inclusive, defendants One Doe Corporation to Five Hundred Doe Corporation, inclusive, defendants One Doe Company to Five Hundred Doe Company, inclusive, and defendants One A Doe to Two Hundred A Doe, inclusive, as the Executors or Administrators, respectively, of the Estates of One B Doe, Deceased, to Two Hundred B Doe, Deceased, inclusive, are each sued or named herein under the fictitious names above set out, for the reason that plaintiff is ignorant of the true names of said defendants and of said decedents; that when the true names of said defendants and said decedents, or any of them, are discovered, plaintiff will amend accordingly, the pleadings and proceedings herein.

That One Doe Corporation to Five Hundred Doe Corporation, inclusive, are corporations organized and existing under the laws of one of the states of the United States; that One Doe Company to Five Hundred Doe

Company, are co-partnerships duly organized and existing, each one of which is composed of two or more co-partners; that One A Doe to Two Hundred A Doe, inclusive, are, respectively, the duly appointed, qualified and acting Administrators or Executors of the Estates of One B Doe, Deceased, to Two Hundred B Doe, Deceased, inclusive. [34]

VI.

That this action is brought by the plaintiff under the authority and pursuant to the provisions of the Act of Congress, approved January 22, 1932, (U. S. C. 601-617) as amended, and Public Law 507, 77th Congress, approved March 27, 1942, and Executive Order 9217, issued by the President of the United States [35] on August 7, 1942, by virtue of and pursuant to authority vested in him by Title II of the Second War Powers Act, 1942, approved March 27, 1942 (Public Law 507, 77th Congress), which acts and executive order authorizes the Reconstruction Finance Corporation to acquire by condemnation property deemed necessary for military, naval, or other war purposes.

VII.

That the public use for which the property hereinafter described is sought to be condemned and taken is the establishment of a reservoir for the storing and conservation of natural gas to relieve a shortage of gas which would impede the war effort; that the said Reconstruction Finance Corporation has determined that it is necessary for war purposes to acquire the property hereinafter described, for the establishment of the said reservoir.

VIII.

That the Requesting Officer hereinbefore mentioned is Leo Neilson, Assistant Secretary of the Reconstruction

Finance Corporation; that said Reconstruction Finance Corporation is an agency of the United States; that by letter to the Attorney General of the United States, dated September 19, 1942, said Requesting Officer requested the institution of this proceeding for the purposes herein set forth, on behalf of the said Reconstruction Finance Corporation, and of Defense Plant Corporation, a Federal corporation; that said Defense Plant Corporation is an agency of, and is wholly owned and controlled by the aforesaid Reconstruction Finance Corporation.

That on September 18, 1942, said Reconstruction Finance Corporation, by a resolution duly adopted by its Board of Directors, resolved and determined that it was necessary for war purposes that the property, real, personal, and mixed, herein described, be acquired by condemnation, and that in connection therewith, the immediate right to occupy, use and improve said property be acquired; [36] that its secretary or assistant secretary be authorized, and are authorized, and directed, to request the Attorney General of the United States to cause the necessary proceeding to be instituted for the condemnation and taking of said property, and further, to cause the necessary action to be taken to occupy, use, and improve said property, pursuant to the provisions of the Act of Congress, approved March 27, 1942 (Public Law 507-77th Congress) and Executive [37] Order 9217, issued by the President of the United States, August 7, 1942, by virtue of and pursuant to authority vested in him by said Public Law 507, 77th Congress.

IX.

That the defendants City of Los Angeles, a municipal corporation, County of Los Angeles, a body politic and corporate of the State of California, the State of California, a sovereign state, Doe One to Doe Two Thousand, inclusive, One Doe Corporation, a corporation, to Five Hundred Doe Corporation, a corporation, inclusive, One A Doe to Two Hundred A Doe, inclusive, as the Executors or Administrators, respectively, of the Estates of One B Doe, Deceased, to Two Hundred B Doe, Deceased, inclusive, One Doe Company, a co-partnership, to Five Hundred Doe Company, a co-partnership, inclusive, and Unknown Persons, each claim some right, title, or interest in, or lien upon the property hereinafter described, or some part thereof, the exact nature of which such claim or claims is unknown to plaintiff. That all other defendants herein named claim to have some right, title or interest in, or lien upon, a part of the property hereinafter described.

X.

That the estate or interest in the property hereinafter described which the plaintiff in this action intends and seeks to take, acquire, condemn, hold, and own is:

(a) The full fee simple title to the real property hereinafter described, subject, however, to existing easements for public utilities;

(b) Title to all the personal property and trade fixtures, hereinafter described, free and clear of all liens and encumbrances, located on said real property

or on any part thereof, on the 28th day of September, 1942. [38]

XI.

The real property hereinabove mentioned which is to be taken and condemned in this action consists of those certain lots, pieces, or parcels of land situated in the County of Los Angeles, State of California, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, together with all buildings, structures, works and fixtures located in or upon said parcels of land or any of them and which are a part of the said realty; said parcels of land are more particularly described as follows, to-wit: [39]

* * * * *

XIII.

That the property which the plaintiff by this action intends and seeks to take, acquire, and condemn, hold and own, includes the following:

All pipe, machinery, appliances, equipment, tanks, structures, tools, supplies, and all other property, whether real or personal, which were located in or upon any of the said tracts of land hereinabove described on the 28th day of September, 1942, and which on said day were used, or were useful, in the operation of any oil and/or gas wells, upon any of said parcels of land, or in the treating, storing, or disposing of the products of any of such wells.

XIV.

That plaintiff is unable to determine at this time how much of the property generally described in the last preceding paragraph is to be deemed part of the real property on which it is located, for the reason that plaintiff does not now know the terms of the oil and gas leases under which said property was placed upon the premises for the purpose of producing oil and gas therefrom; and plaintiff therefore designates all of said property as personal property and trade fixtures, solely for the purpose of identifying the same as part of the property to be taken in this proceeding, and will ask leave of Court to amend this complaint accordingly if and when it shall be ascertained that any of the property herein designated as personal property and trade fixtures is, in fact, part of the realty upon which it is located.

XV.

That an inventory of all of the property referred to and described in the last two preceding paragraphs hereof is filed with [40] the Clerk of this Court for the inspection of any interested party, and the plaintiff will, upon demand, deliver a copy thereof to any party to this proceeding.

XVI.

That under the provisions of the Second War Powers Act of 1942, [41] approved March 27, 1942 (Public Law 507 - 77th Congress), it is provided, in part, as follows:

“Upon or after the filing of the condemnation petition, immediate possession may be taken and the prop-

erty may be occupied, used and improved for the purpose of the Act notwithstanding any other law;”

that by reason thereof the United States is entitled to immediate possession and use of the property herein sought to be condemned;

That the Assistant Secretary of the Reconstruction Finance Corporation, in a letter dated September 19, 1942, mentioned in Paragraph VIII of this complaint, stated, in part, that it is vital to the successful prosecution of the war that the United States be granted the immediate right of possession of the hereinabove described property, and requested the securing by the United States of such right of immediate possession.

Wherefore, plaintiff prays judgment;

1. That the Court ascertain and assess the value of the property herein sought to be taken and condemned and of each and every separate estate or interest therein.

2. Adjudging that the public uses for which plaintiff takes and condemns said property are necessary public uses of the plaintiff and that the uses to which said property are to be applied are uses authorized by law and that all of the said property so taken is necessary thereto.

3. Adjudging that the full fee simple title to the lands hereinbefore described is vested in the United States of America subject, however, to existing easements for public utilities; and further adjudging that title to all of the property, whether real, personal or mixed, used or useful

in connection with the operation of any oil and/or gas wells upon any of said parcels of land or in the treating, storing or disposing of the products of any such [42] wells is vested in the United States of America free and clear of all liens and encumbrances; and further adjudging that the right to just compensation for the lands and property hereinbefore described is vested in the persons entitled thereto, as their respective interests may appear and be [43] established by judgment herein.

4. That an order issue from this Court vesting the right to immediate possession in the plaintiff of the lands and property herein described and sought to be condemned in this action and directing all parties in possession thereof to forthwith yield up possession of the same to the plaintiff.

5. That all liens or encumbrances against any of the property sought to be taken and condemned herein be satisfied out of the award or awards to be made in this proceeding.

6. That the plaintiff have such other and further relief as to the Court may seem just and proper in the premises and as the nature of the case may require.

IRL D. BRETT

Special Assistant to The Attorney General

By Irl D. Brett

Attorney for Plaintiff

[Endorsed]: Filed Jan. 12, 1944. [44]

[Title of District Court and Cause]

ANSWER OF SAMARKAND OIL COMPANY,
A CORPORATION

Now comes defendant Samarkand Oil Company, a corporation, and answering plaintiff's first amended complaint for itself alone, and not for its co-defendants, admits, denies and alleges as follows, to wit:

* * * * *

VI.

Alleges that on September 28, 1942, this defendant was, and at all times since said date has been, the owner and entitled to the immediate possession of all the personal property situated upon the leasehold interest described in Paragraph V of this answer, being particularly set forth on pages 99 to 104, of the inventory filed by plaintiff herein and the additional personal property described in Exhibit "A", attached hereto and hereby made a part thereof. [45]

That said personal property so belonging to Samarkand Oil Company, a corporation, was on September 28, 1942 unlawfully taken by the United States of America, Reconstruction Finance Corporation, a Federal Corporation, and Defense Plant Corporation, a Federal Corporation, and their agents, and that said material and supplies, personal property and improvements were on the 28th day of September, 1942, of the reasonable value of \$261,104.14, and the United States of America, Reconstruction Finance Corporation, a Federal Corporation, and Defense Plant Corporation, a Federal Corporation, and their agents, at all times since said 28th day of September, 1942, so unlawfully retains possession of said property.

VII.

That in the event that the judgment decrees the taking of said real and/or personal property by condemnation, this defendant should have judgment against plaintiff for the following sums:

Leasehold interest, including									
well thereon							\$670,000.00		
Personal property							\$261,104.14 [46]		
*	*	*	*	*	*	*	*	*	*

Wherefore this defendant prays:

1st: That the above entitled action be dismissed and that it have judgment for its costs.

2nd: That in the event that said action is not dismissed as to either real or personal property, and a decree of condemnation is ordered, that plaintiff be by said judgment ordered and directed to pay this defendant as damages for the taking of said real and personal property, as follows:

Leasehold interest and well . . .							\$670,000.00		
Personal property							\$261,104.14		

3rd: For such other and further relief as to the Court may seem proper and for costs of suit.

BODKIN, BRESLIN & LUDDY

By Henry G. Bodkin

Attorneys for Defendant Samarkand Oil Company,
a corporation.

[Endorsed]: Apr. 30, 1945. [47]

[Title of District Court and Cause]

PROPOSED AMENDED ANSWER OF TREASURE
COMPANY, A CORPORATION

Now comes defendant Treasure Company, a corporation, and answering plaintiff's first amended complaint for itself alone and not for its co-defendants, files this its first amended answer, and answering said first amended complaint, admits, denies and alleges as follows, to wit:

* * * * *

XII.

Alleges that on the 28th day of September, 1942, this defendant, Treasure Company, a corporation, was, and at all times since said date has been, the owner and entitled to the immediate possession of all of the personal property and improvements upon the real property described in Paragraph V, VI, VII and VIII hereof, with the exception of a crude petroleum oil gravity retainer, referred to on page 112 of the inventory filed herein by plaintiff, and with the further exception of a pulling unit, which is referred to on page 109 of said inventory, filed herein by plaintiff. That on pages 105 to 113, both inclusive, of said inventory, plaintiff has described material and supplies which it alleges belong to Treasure Company and which plaintiff alleges were taken by Defense Plant Corporation. That Treasure Company alleges it was on the 28th day of September, 1942, the owner of all the material and supplies so described on said pages 105 to 113 inclusive of said inventory, with the exceptions hereinabove referred

to, and that there was upon the above described real property, on September [48] 28, 1942, certain personal property and improvements which were then and there owned by Treasure Company and which were not described or only partially described in said inventory, and that such personal property and improvements are described generally in Exhibit "A", attached hereto; that upon the trial of the above entitled action a more detailed description of the property referred to in said Exhibit "A" will be introduced in evidence.

That said personal property so belonging to Treasure Company was on September 28, 1942 unlawfully taken by the United States of America, Reconstruction Finance Corporation, a Federal Corporation, and Defense Plant Corporation, a Federal Corporation, and their agents, and that said material and supplies, personal property and improvements were on the 28th day of September, 1942, and at all times since have been and now are of the reasonable value of \$180,231.82, and the United States of America, Reconstruction Finance Corporation, a Federal Corporation, and Defense Plant Corporation, a Federal Corporation, and their agents, at all times since said 28th day of September, 1942, so unlawfully retained possession of said property.

XIII.

Alleges that in the event the judgment decrees the taking by condemnation of said real and/or personal property

for the purposes recited in plaintiff's complaint, defendant should have judgment against the plaintiff as follows:

Fletcher lease, including

well thereon \$1,000,000.00

Burns Leases Nos. 1, 2 and 3 . . . 1,000,000.00

Personal property 180,231.82

Total \$2,180,231.82 [49]

* * * * *

Wherefore this defendant prays:

1st: That the above entitled action be dismissed and that it have judgment for its costs.

2nd: That in the event that said action is not dismissed as to either real or personal property, and a decree of condemnation is ordered, that plaintiff be by said judgment ordered and directed to pay this defendant as damages for the taking of said real and personal property, as follows:

Fletcher lease, including

well thereon \$1,000,000.00

Burns Leases Nos. 1, 2 and 3 . . . 1,000,000.00

Personal property 180,231.82

Total \$2,180,231.82

3rd: For such other and further relief as to the Court may seem proper and for costs of suit.

BODKIN, BRESLIN & LUDDY

By Henry G. Bodkin

Attorneys for Defendant Treasure Company,
a corporation.

[Endorsed]: Lodged Apr. 30, 1945. Filed May 28, 1945. [50]

[Title of District Court and Cause]

CONCLUSIONS OF THE COURT AND DECISION ON MOTION FOR INJUNCTION

This is a motion for an injunction by this court to restrain proceedings in an action filed and pending in the Superior Court of the State of California in and for the County of Los Angeles. The injunction is sought by the plaintiff as auxiliary to an action in condemnation pending in this court to preserve what plaintiff alleges to be the priority of jurisdiction in the United States District Court.

The crucial and ultimate question for decision may be thus stated: As between the applicable Federal and State tribunals, has this court under the record before it acquired a priority of jurisdiction necessitating injunction against further proceedings by two private corporations of the State of California against another corporation of the same State to recover the possession of specific personal property in civil actions pending therein under the laws of the State of California? We think the question should be answered in the negative. Accordingly the motion for injunction filed herein March 10, 1945 is denied. Exceptions allowed *movents*. See Rule 81(7), F. R. C. P. [51]

Pursuant to investiture in the Second War Powers Act, (50 U. S. C. A. 632) to the Reconstruction Finance Corporation, that body, under date of September 19, 1942, on behalf of the Defense Plant Corporation, an affiliate and subsidiary, caused proceedings to be instituted in this court to acquire by condemnation certain real property within the jurisdiction of this court. The complaint was filed September 28, 1942, and on that day an order for

possession was entered. The only service as far as the property involved in this motion is concerned was by posting on the real property involved. Neither the letter of authority authorizing the institution of the action, the complaint in condemnation, nor the order for possession provided for the condemnation or acquisition of personal property. These instruments all specifically called for the condemnation of land only.

Notwithstanding the limitations of the order for possession, the seizure made by the Government on September 28, 1942, included personal property, as well as real property, of the Treasure Company and Samarkand Oil Company, the two defendants in this action that are resisting the instant motion for injunction.

The purpose of the acquisition of the subject properties was to provide gas storage facilities for defense needs on the site of depleted oil wells. However, the record discloses that personal property not affixed to the realty was seized by the agents of the Government and that, also, a producing oil well is now in the lands of the Government agents.

In August, 1943, the Defense Plant Corporation and the Union Oil Company of California entered into a contract for the operation of the acquisitioned property by the [52] Union Oil Company of California.

On November 15, 1943, the Treasure Company and the Samarkand Oil Company filed claim and delivery actions against the Union Oil Company in the Superior Court of the State of California in and for the County of Los Angeles. Service of process therein upon the Union Oil Company followed on November 16, 1943. The Union

Oil Company filed answers in such actions on January 3, 1944.

On November 24, 1943, an admittedly ineffectual amendment to the complaint in condemnation was filed in this court. Later, on January 12, 1944, an authorized amendment to the complaint in condemnation was filed herein. This pleading specified as within the scope of the condemnation proceeding the personal property which is the bone of contention in the proceeding before the court. On January 5, 1944, the Defense Plant Corporation filed in the State court actions in claim and delivery its application to intervene therein. Such application was granted. On February 5, 1945, the Defense Plant Corporation duly filed and presented in the Superior Court motions to abate the claim and delivery actions in such State court. These motions to abate the claim and delivery actions were by the said Superior Court denied. (See memorandum opinion by Judge William J. Palmer in Exhibit "E" herein). On March 10, 1945, the instant motion for injunction with its accompanying petition was filed in this court. The motion was argued and submitted for decision by the respective parties on March 29, 1945.

The question of priority of jurisdiction necessarily involves the legal nature of an action to recover possession of personal property on one hand, and the legal nature of federal eminent domain proceedings on the other. [53]

Preliminarily to a consideration under the record before us as to the legal nature of the actions in the State and Federal courts with which we are concerned we should keep in mind the restrictive terms of the ancient Act of March 2, 1793, now embodied in Section 265 of the Judicial Code, Title 28, U. S. C. A., Section 379.

This sweeping prohibition of interference with proceedings in State courts by Federal injunction provides that "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State except in cases where injunction may be authorized by any law relating to proceedings in bankruptcy."

In the recent decision in *Toucey v. New York Life Insurance Co.*, 314 U. S. 118, (1941), the Supreme Court, after recounting the history and sensitive field of judicial authority involved in this legislation, reaffirmed the doctrine enunciated by the Court in its earlier decision in *Kline v. Burke Construction Co.*, 260 U. S. 226, where it stated: "The rank and authority of the courts (Federal and State) are equal but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist, the rule does not apply. Since that necessity does exist in actions in rem and does not exist in actions in personam, involving a question of personal liability only, the rule applies in the former but does not apply in the latter."

So important has been the Congressional circumspection in avoiding occasions for placing the tribunals of the [54] States and of the Union in any collision that the Supreme Court has deemed it necessary to succinctly mark the bounds of priority of jurisdiction in the following graphic manner: "* * * where a state court first acquires control of the res, the federal courts are disabled from exercising

any power over it, by injunction or otherwise." *Toucey v. New York Life Ins. Co., supra.*

And "the restrictions of Section 265 of the Judicial Code upon the use of the injunction to stay litigation in the State court confine the District courts even though such an injunction is sought in support of an earlier suit in the Federal Courts." *Southern Ry. Co. v. Painter*, 314 U. S. 155, (1941).

We turn now to examine the nature and character of the two types of action which concern us in this motion under consideration.

An action to recover possession of personal property is a statutory remedy. Section 3379 of the Civil Code of California provides that "A person entitled to the immediate possession of specific personal property may recover the same in the manner provided by the Code of Civil Procedure." Sections 509 to 520 of the Code of Civil Procedure of the State of California provide for the provisional remedy of "Claim and Delivery of personal property." These later procedural statutes merely provide an auxiliary remedy by which, when a party brings an action to recover personal property, he may, upon compliance with statutory requisites, "claim" that the property be immediately delivered to him at the commencement of the action and without awaiting trial. *Faulkner v. First National Bank*, 130 Cal. 258.

Thus it is clear that in an action under the laws of the State of California to recover the possession of [55] personal property the statutory auxiliary process of "claim and delivery" is optional. The nature of the action to recover personalty is unaffected regardless of whether or not the provisional remedy is applied. In other words,

the invoking of the provisional remedy is in no way a necessity to the cause of action. It is merely an additional aid to secure in advance the judgment that is sought by the plaintiff under the laws of the State of California.

It is settled under California decisions that an action for the recovery of personal property is what is termed a mixed action, being partly in rem and partly in personam. The action is in rem so far as the specific recovery of the chattels is concerned, and in personam in so far as damages are sought. *Williams v. Atchison, etc. Ry. Co.*, 156 Cal. 140; *Claudius v. Aguirre*, 89 Cal. 501; *Wellman v. English*, 38 Cal. 583.

Any argument that the actions in the State court did not bring into the judicial custody of such court the specific property to which the instant motion is directed as of their date of institution, stems, we think, from an erroneous conclusion that the failure to invoke the California provisional remedy of "claim and delivery" changes the nature and essential character of replevin actions. Inherently the actions in the State court are not determinable by the utilization of the auxiliary process provided by the local law. It is settled law that where the action is in rem the effect is to draw to the court attaching jurisdiction the control, actual or potential, of the res. And no matter how inadequate "res" may be as a descriptive label, it is not true that a money claim "in personam" cannot be a "res." Such a claim in an action "quasi in rem" can be properly so characterized. *Brooklyn Trust Co. v. Kelby*, (C. C. A. 2), 134 F. 2d 105 at 116. [56]

The legal nature of a condemnation proceeding is thoroughly settled. A condemnation proceeding is a proceeding in rem. *U. S. v. Dunnigton*, 146 U. S. 228; *In re Condemnation Suits by United States*, 234 Fed. 443.

It thus appears from pertinent authorities that the actions in the State court and the proceedings in this District court are both predicated on causes of action which seek to affect a specific res, and thus are in rem and quasi in rem in nature. See *Lee v. Silva*, 197 Cal. 364.

But the solution of the problem before us is dependent also upon the time of acquisition of jurisdiction in the State court in the actions to recover the possession of personal property as well as the nature of the action. Under applicable law jurisdiction of a court in civil actions is acquired from the time of service of summons. Section 416, Code of Civil Procedure. Interpretations of this code section establish that the court whose process is first served has the prior jurisdiction. 7 Cal. Jur. 593. It has been shown at the time of the hearing of the motion for injunction that the process in the two local actions to recover the possession of personal property was served upon the defendant Union Oil Company of California before the amended complaint in the instant condemnation proceeding was filed. It is evident that the State court acquired jurisdiction at least nine days before there was any specific token of acquisition by the Government of the personal property in dispute.

Now as to the acquiring of jurisdiction in a Federal eminent domain proceeding it has been reliably stated that the filing of the petition is the first step in a condemnation proceeding of the judicial type and is a jurisdictional prerequisite to the authority of the court to entertain the

proceeding. Federal Eminent Domain Manual, Lands Division, [57] Department of Justice, page 371. See, also, Lewis on Eminent Domain, Volume 2, section 867; Nichols on Eminent Domain, Volume 2, page 1041.

While no eminent domain decision has been called to our attention and we have found none precisely holding that the court's jurisdiction in eminent domain proceedings of the judicial type attaches as of the filing of the petition in condemnation, this appears to be the general rule in so far as in rem proceedings in general are concerned.

In the early case of *Farmers Loan and Trust Co. v. Lake Street Elev. R. R. Co.*, 177 U. S. 51, the rule followed since was announced by the court as follows: "As between the immediate parties in a proceeding in rem jurisdiction must be regarded as attaching when the bill is filed and process has been issued, * * *." This rule as to priority of jurisdiction in actions in rem or quasi in rem has been confirmed in the comparatively recent decision in *Princess Lida of Thurn et al. v. Thompson et al.*, 305 U. S. 456 (1939), in the following pertinent language: "We turn to the suit instituted in the District Court to ascertain what relief was there sought. * * * Certain it is, therefore, that if both courts were to proceed they would be required to cover the same ground. This of itself is not conclusive of the question of the District Court's jurisdiction, for 'it is settled that where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may

proceed with the litigation at least until judgment is obtained in one of them which may be set up as *res judicata* in the other. On the other hand, if the two suits are in *rem*, or quasi in *rem*, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to [58] proceed with the cause and grant the relief sought the jurisdiction of the one court must yield to that of the other. We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property. (Citing cases). The doctrine is necessary to the harmonious cooperation of federal and state tribunals." (Citing *United States v. Bank of New York & Trust Co.*, 296 U. S. 463).

The same jurisdictional principle enunciated in these decisions of the Supreme Court has been restated by our Circuit Court of Appeals in *Hutchins v. Pacific Mut. Life Ins. Co. of California, et al.*, 97 F. 2d 58, (1938), wherein a specific *res* was in the possession of the California court and a dispute arose as to the priority of jurisdiction between such court and the Federal Court and wherein Judge Healy writing for the court stated: "It is settled law that

where a State and a Federal court both have concurrent jurisdiction in suits in rem or quasi in rem, the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other."

While it is probably true under the broad powers reposed by Congress in the Executive by Title II of the Second War Powers Act that the personal property involved in this controversy might have been acquisitioned with the land or acquired as incidental thereto, the record evidence [59] before us clearly proves that no such situation existed. As previously adverted to, all of the memorials, instruments of authority and pleadings leading up to and accompanying the acquisition by the plaintiff pertain to land, and only to land. Nor is there any indication in the resolutions of the acquiring agency of September 19, 1942 and October 19, 1942 that evince any intention to acquire the personal property in dispute as part of the natural gas storage facility sought through the condemnation proceedings instituted in this court.

The fair preponderance of the evidence before us establishes, we think, that the present claim that it was the intention from the inception of the project to acquire the personalty is an afterthought conceived to avoid possible consequences of the seizure of September 28, 1942.

There can be no serious claim of ratification by plaintiff of the seizure of the personalty because before any adequate manifestation by plaintiff of an intention to acquire such property was evident, the State court had already

acquired jurisdiction of the res. The factual situation here is dissimilar to that before the court in *Yearsley v. Ross Construction Co.*, 309 U. S. 18. Moreover, the *Yearsley* decision does not enunciate the principle that ratification of a taking without condemnation proceedings ipso facto confers jurisdiction on the United States court.

The sole method chosen to acquire the necessary war facility to which the action in this court relates was by condemnation proceedings of the judicial type brought as Title II of the Second War Powers Act specifies in accordance with the Act of August 1, 1888, Title 40 Sections 257, 258, U. S. C. A. One of the jurisdictional essentials of a proceeding in condemnation of the judicial type is that the [60] property sought to be taken shall be described in the petition (complaint). See Section 1244, California Code of Civil Procedure.

It is clearly established by the record before us that no specification whatever of any personalty was made in any of the proceedings until the month of October, 1943, when for the first time an authorization to amend the pleadings so as to include personal property was given, and it was not until the following January that the amended complaint directed to the acquisition of the personal property in issue was filed.

Thus we find that the earliest effectual and authorized acquiring of the personal property by the Government was subsequent to the acquiring of jurisdiction over the same res by the State court in the recovery actions pending

therein. As no other type of authority than judicial has been invoked or applied by plaintiff in the acquisition under consideration, we consider argument and authorities as to the lodgment in the United States of other processes in eminent domain as academic and irrelevant to the motion before the court.

We conclude with the observation that the injunction to restrain proceedings in either of the State court actions is unnecessary under the record before us. In the local suits no relief to the oil companies other than money judgments appears to be now possible. Such an outcome in the State court would neither impair nor defeat the jurisdiction of this court in the condemnation proceeding.

The petition for injunction is denied. The motion for injunction is denied. Exceptions allowed movents.

There is some doubt as to the necessity of formal findings of fact, conclusions of law and judgment herein by [61] reason of the inapplicability of the Federal Rules of Civil Procedure in condemnation proceedings. Rule 81(a)7. However, should counsel desire formal findings of fact, conclusions of law and judgment they should be in conformity hereto prepared and presented to the Judge for consideration within five days from date hereof.

Dated June 12, 1945.

PAUL J. McCORMICK

United States District Judge.

[Endorsed]: Filed Jun. 12, 1945. [62]

[PLAINTIFF'S EXHIBIT NO. 2]

AMENDATORY RESOLUTION

Whereas, this Corporation at the request of Defense Plant Corporation has caused condemnation proceedings to be instituted in the name of the United States pursuant to the provisions of the Act of Congress approved March 27, 1942 (Public Law 507, 77th Congress) and Executive Order 9217, for the purpose of obtaining possession of the lands described in the attached Exhibit "A", for use as a storage reservoir for natural gas (Playa del Rey Natural Gas Storage Project, Plancor 1406); and

Whereas, Defense Plant Corporation has requested this Corporation to arrange for the filing of a Declaration of Taking in the condemnation proceedings in order that title to said lands may vest in the United States at the earliest possible time;

Resolved, that the Resolution adopted by the Board of Directors of this Corporation on September 18, 1942 be amended by adding thereto the following Resolved Fourth, Resolved Fifth and Resolved Sixth:

"Resolved Fourth: It is necessary and advantageous in carrying out the authority vested in Defense Plant Corporation to acquire by condemnation the land described in Exhibit 'A'.

"Resolved Fifth: The Treasurer or Assistant Treasurer and the Secretary or Assistant Secretary of this Corporation be, and hereby are, authorized

and directed to execute under the seal of this Corporation a Declaration of Taking covering the land described in Exhibit 'A' in form and substance satisfactory to General Counsel or an Assistant General Counsel of this Corporation and to arrange for the delivery of such Declaration of Taking to the Attorney General of the United States for appropriate action.

“Resolved Sixth: Just compensation for the land described in Exhibit 'A' is estimated to be Seven Hundred Forty Thousand Four Hundred Sixty-nine Dollars (\$740,469).”

* * * * *

The foregoing Resolution was duly adopted by the Board of Directors of Reconstruction Finance Corporation on the 19th day of October, 1942.

Leo Nielson

Secretary

Reconstruction Finance Corporation

Case No. 2454-B Civ. U. S. vs. Land. Plf's Exhibit No. 2 in Evidence. Date 7/2/45. Clerk, U. S. District Court, Sou. Dist. of Calif. R. B. Clifton, Deputy Clerk. [63]

[Title of District Court and Cause]

PETITION FOR INJUNCTION

Comes now the United States of America, petitioner herein, by the authority and at the direction of the Attorney General of the United States, and respectfully shows unto this Honorable Court:

I.

That heretofore, to wit, on September 18, 1942, Reconstruction Finance Corporation, a federal corporation, an agency of the United States of America, by resolution of its Board of Directors, determined that it is necessary that the lands hereinafter referred to be acquired for war purposes by condemnation proceedings, and that in connection therewith the immediate right to occupy, use and improve such lands be acquired, and thereupon requested the Attorney General of the United States to cause the necessary proceedings to be instituted for the condemnation of said lands, and to procure a court order granting immediate right to occupy, use and [64] improve said lands, pursuant to the provisions of the Act of Congress approved March 27, 1942 (Public Law 507, 77th Congress), and Executive Order 9217, issued by the President of the United States on August 7, 1942; that upon said determination by, and request of, said Reconstruction Finance Corporation, petitioner, on September 28, 1942, filed its Complaint in Condemnation, in this Court, as Civil No. 2454-B, wherein and whereby it sought to condemn the lands designated in the aforesaid determination and request of said Reconstruction Finance Corporation. A true and correct copy of said resolution and request is attached hereto, marked "Exhibit A", and made a part hereof. Said Complaint

in Condemnation, filed as aforesaid, is by reference incorporated herein and made a part hereof.

II.

That thereupon, to wit, on September 28, 1942, upon the filing of said Complaint in Condemnation in this Court as aforesaid, this Court made and entered its order, by this reference incorporated herein and made a part hereof, granting the petitioner, United States of America, immediate possession of the property described in its said Complaint; and thereupon and pursuant to said order petitioner took and went into possession of all the property described in said Complaint, and since that date petitioner has been, and now is, in possession of all of said property. That petitioner took possession of said property as aforesaid by and through the Defense Plant Corporation, a federal corporation, an agency of the aforesaid Reconstruction Finance Corporation; that upon taking possession of said property as aforesaid, said Defense Plant Corporation employed the Union Oil Company of California, a corporation, to make an inventory of the oil well machinery and equipment located on the property taken as aforesaid, and to conserve, maintain and operate said property for and on behalf of petitioner.

III.

That thereafter on October 26, 1942, petitioner, United States of America, by and through said Reconstruction Finance Corporation, filed a Declaration of Taking in the aforesaid condemnation action, Civil No. 2454-B, [65] pursuant to Section 258a of 40 U. S. C. A., in the above entitled Court, wherein and whereby it took the full fee simple title, subject only to existing easements for public utilities, in and to all the property described in the afore-

said Complaint in Condemnation and in said Declaration of Taking, and simultaneously deposited in the Registry of this Court the estimated just compensation for the property so taken. Said Declaration of Taking is by reference incorporated in and made a part hereof.

IV.

That thereafter on October 4, 1943, the said Reconstruction Finance Corporation, by an amendatory resolution duly and regularly adopted by its Board of Directors, approved, ratified and confirmed the taking, condemnation and possession of, among others, all the property hereinafter referred to, and the inclusion thereof in this proceeding. A true and correct copy of said amendatory resolution, and the request to the Attorney General of the United States therein provided for, is annexed hereto, marked "Exhibit B", and made a part hereof.

V.

That thereafter on January 12, 1944, pursuant to the request of the said Reconstruction Finance Corporation to the Attorney General of the United States, and by the authority of the said Attorney General, the petitioner, United States of America, by its attorneys of record, filed herein its First Amended Complaint, which is, in so far as is material and pertinent to this petition, by reference incorporated herein and made a part hereof; that thereafter on, to wit, January 20, 1944, said petitioner filed in said condemnation proceeding the inventory referred to in Paragraph XV of its said First Amended Complaint, a true copy of which, in so far as is material and pertinent to this petition, is annexed hereto, marked "Exhibit C", and made a part hereof.

VI.

That thereafter on April 30, 1945, Samarkand Oil Company, a corporation, and a defendant in said condemnation proceeding, appeared and filed its Answer therein to petitioner's First Amended Complaint, and [66] alleged, among other things, that it was the owner of a certain oil and gas sublease on a portion of the lands described in petitioner's Complaint, and First Amended Complaint, and in its Declaration of Taking filed as aforesaid; and said defendant further alleged that it was, on September 28, 1942, the owner of all the personal property situate on its aforesaid leasehold, particularly described in its said Answer; and said defendant further alleged that said personal property was, on said September 28, 1942, unlawfully taken by petitioner, United States of America, Reconstruction Finance Corporation, a federal corporation, and Defense Plant Corporation, a federal corporation, and their agents, and that said personal property was, on said date, of the reasonable value of \$261,104.14; and said defendant in said Answer further alleged that in the event that judgment in said condemnation proceeding decrees the taking of its said real and/or personal property by condemnation, said defendant should have judgment against petitioner for the alleged value thereof.

VII.

That thereafter on May 28, 1945, Treasure Company, a corporation, and a defendant in said condemnation action filed as aforesaid, filed an Amended Answer to petitioner's First Amended Complaint in Condemnation filed as aforesaid, and alleged, among other things, that it was the owner of certain oil and gas subleases on a portion of the lands described in petitioner's Complaint and First

Amended Complaint in Condemnation and in its Declaration of Taking filed in this Court as aforesaid; and said defendant further alleged that it was, on September 28, 1942, the owner of certain personal property and improvements upon the real property described in its Amended Answer, which personal property and improvements were generally described in an exhibit annexed to said Amended Answer; and said defendant further alleged in said Amended Answer that said personal property was, on September 28, 1942, unlawfully taken by Petitioner, the United States of America, Reconstruction Finance Corporation, a federal corporation, and Defense Plant Corporation, a federal corporation, and their agents, and that said personal property was, on September 28, 1942, of the value of [67] \$180,231.82; and said answer further alleged that, in the event that judgment in said condemnation proceeding decrees the taking by condemnation of said real and personal property for the purposes recited in petitioner's First Amended Complaint, the said defendant should have judgment for the alleged value of its aforesaid leasehold estate and personal property.

VIII.

That by reason of the pleadings filed as aforesaid in said condemnation proceeding, the said proceeding is now, and has been since April 30, 1945, at issue as to the real and personal property claimed by the defendant Samarkand Oil Company and described in its said answer; and the said proceeding is now, and has been since May 28, 1945, at issue as to the real and personal property claimed by the defendant Treasure Company and described in its said Amended Answer.

IX.

That thereafter on September 27, 1945, the said Samar-kand Oil Company filed a complaint in the Superior Court of the State of California, in and for the County of Los Angeles, as Case No. 505,968, against the Union Oil Company of California, as sole defendant, for the recovery of the possession of the personal property, (or its value in damages for withholding) which is described in its answer filed in the condemnation suit as aforesaid, notwithstanding that said defendant then well knew that possession of said property was, in truth and in fact, taken by your petitioner in said condemnation proceeding, and that said defendant had joined issue in said proceeding and submitted to this Court the determination of your petitioner's right to take and condemn said personal property.

X.

That on September 27, 1945, the said Treasure Company filed in the Superior Court of the State of California, in and for the County of Los Angeles, as Case No. 505,967, a complaint against the Union Oil Company of California, as sole defendant for the recovery of possession of the personal property, (or its value in damages for withholding) which [68] is described in its amended answer filed in the condemnation suit as aforesaid, notwithstanding that said defendant then well knew that possession of said property was, in truth and in fact, taken by your petitioner in said condemnation proceeding, and that said defendant had joined issue in said proceeding and submitted to this Court the determination of your petitioner's right to take and condemn said personal property.

XI.

That on November 10, 1945, the said Samarkand Oil Company filed in the Superior Court of the State of California, in and for the County of Los Angeles, an action against Union Oil Company of California, as sole defendant, Case No. 507,386, for damages for alleged wrongful production and removal of gas and oil from Samarkand Oil Company's leasehold estate described in its answer filed in the condemnation proceeding as aforesaid; notwithstanding that said defendant then well knew that petitioner had filed in said condemnation proceeding its Declaration of Taking, which included the said leasehold estate, and had deposited in the Registry of this Court the estimated just compensation therefor, and that said defendant had filed its answer in said condemnation proceeding and submitted the determination of its rights to the jurisdiction of this Court

XII.

That on November 10, 1945, the said Treasure Company filed in the Superior Court of the State of California, in and for the County of Los Angeles, an action against Union Oil Company of California, as sole defendant, Case No. 507,385, for damages for alleged wrongful production and removal of gas and oil from Treasure Company's leasehold estate described in its amended answer filed in the condemnation proceeding as aforesaid; notwithstanding that said defendant then well knew that petitioner had filed in said condemnation proceeding its Declaration of Taking, which included the said leasehold estate, and had deposited in the Registry of this Court the estimated just compensation therefor, and that said defendant had filed its amended answer in said condemnation proceeding and

submitted the determination of its rights to the jurisdiction of this [69] Court.

XIII.

That the property described in and which forms the subject matter of the actions described in Paragraphs IX, X, XI, and XII hereof is a portion of the property taken, condemned, and possessed by petitioner, United States of America, in this proceeding, being the property more particularly described in its First Amended Complaint on file herein, and in Exhibit C hereof.

XIV.

That at and during all the times mentioned herein and now, and in and about the custody, control, management, and operation of, among others, the property in this petition referred to and which is the subject matter of the aforesaid actions filed by Samarkand Oil Company and Treasure Company in the Superior Court of the State of California as aforesaid, the said Union Oil Company of California is, and was at all times herein mentioned, the agent of petitioner, United States of America; that at all such dates and times your petitioner was, and is, the principal and the real and only party in interest in connection with the possession, custody, control, management, and operation of the property described and referred to in the aforesaid actions filed by the defendants Samarkand Oil Company, a corporation, and Treasure Company, a corporation, in the Superior Court of the State of California, as aforesaid. That the facts in this paragraph set forth were well known to said Samarkand Oil Company and said Treasure Company at and long prior to the time of the filing of their aforesaid actions against Union Oil Company of California, in the Superior Court of the State of California.

XV.

That in the taking, retaining, and condemnation of the property described herein your petitioner, United States of America, is exercising a power of sovereignty and is subject only to the constitutional limitations governing the exercise of such power and to such orders and decrees as this Honorable Court may make during this proceeding. [70]

XVI.

That by reason of the premises, the Superior Court of the State of California, in and for the County of Los Angeles, was and is without jurisdiction to hear or determine any of the matters and issues in the actions described in Paragraphs IX, X, XI, and XII hereof, or to make any order, or judgment, for possession, or to fix any measure of damages for the taking and possession of said property, or any portion thereof.

XVII.

That to permit the defendants Samarkand Oil Company, a corporation, and Treasure Company, a corporation, to proceed further, or to judgments, in the actions described in Paragraphs IX, X, XI, and XII hereof, would result in unseemly conflict with the power and jurisdiction of this Court in this condemnation proceeding in this; that it would tend to wrongfully and unlawfully hamper, restrict, and impede petitioner, United States of America, in and about the exercise of its power of eminent domain, and would tend to obstruct, impede, embarrass and delay this Honorable Court in its determination and enforcement of the constitutional and statutory provisions relative to, the

taking and condemnation for public use of the property which forms the subject matter of this suit, and of the determination of the just compensation to be paid for such taking and condemnation, and the apportionment of such compensation to the parties who may be entitled thereto of which it has prior and exclusive jurisdiction.

XVIII.

That in the employment of Union Oil Company of California to conserve, maintain and operate the aforesaid real and personal property, for Defense Plant Corporation, as aforesaid, said Defense Plant Corporation covenanted and undertook to save and hold harmless said Union Oil Company of California from and against any claims and demands or causes of action on the part of third persons resulting from the condemnation, taking or acquisition of the site or any portion thereof, or the possession or occupancy thereof by Union Oil Company of California under its said agreement of employment by said Defense Plant Corporation; that by joint resolution [71] of Congress (Public Law 109, 79th Congress), approved June 30, 1945, effective July 1, 1945, Defense Plant Corporation, among others, was dissolved, and its powers, functions, and liabilities were transferred to said Reconstruction Finance Corporation; that Reconstruction Finance Corporation is wholly owned by your petitioner, United States of America; that by reason of the facts aforesaid, petitioner is the real party in interest in the defense of the aforesaid actions in the Superior Court of the State of California, although not before said court and not subject to its jurisdiction, and any judgments rendered therein would, in effect, be a judgment against it, in absentia, and payable out of its treasury.

Wherefore, petitioner being without other remedy in the premises, prays this Honorable Court for an order enjoining and restraining the defendants Treasure Company, a corporation, and Samarkand Oil Company, a corporation, and their respective agents and attorneys, successors and assigns, and each of them, from proceeding further in the actions described in Paragraphs IX, X, XI, and XII hereof, or from doing or attempting to do any act, or taking any proceeding, tending to fix or determine their rights, or the rights of any or either of them, or of petitioner, United States of America, or any of its agencies and their agents, in connection with, resulting from, or growing out of the entry upon, taking, and continued possession or condemnation of the property, or any portion thereof, described in petitioner's First Amended Complaint on file herein, and except such proceedings in this Court as are provided for by its rules of practice or by the laws in such case made and provided.

Petitioner further prays for such other and further relief in the premises as the nature of the case may require and as to the Court shall seem meet, just and equitable.

Dated: This 11th day of February, 1946.

UNITED STATES OF AMERICA

By Eugene D. Williams

Special Assistant to the Attorney General

Of Counsel for Petitioner:

J. F. McPHERSON

Special Assistant to the Attorney General

AUGUST WEYMANN

Special Attorney, Lands Division,

Department of Justice. [72]

EXHIBIT A
RESOLUTION

Whereas, Defense Plant Corporation, a corporation created pursuant to Section 5(d) of the Reconstruction Finance Corporation Act, as amended, deems it necessary for war purposes to acquire certain lands in the vicinity of Los Angeles, California, (Playa Del Rey Gas Storage Project, Plancor 1406) for use as a storage reservoir for natural gas; and

Whereas, Defense Plant Corporation has been unable to acquire title by purchase to the lands required for said storage reservoir, which lands are fully described in Exhibit "A" attached hereto and made a part hereof; and

Whereas, This Corporation has been requested by Defense Plant Corporation to cause condemnation proceedings to be instituted in the name of the United States pursuant to the provisions of the act of Congress approved March 27, 1942 (Public Law 507, 77th Congress) and Executive Order 9217, issued by the President of the United States on August 7, 1942, by virtue of and pursuant to authority vested in him pursuant to said Public Law 507, 77th Congress, *supra*;

Whereas, Defense Plant Corporation has agreed to make available the funds necessary to pay the costs of acquiring by condemnation the lands described in said Exhibit "A";

Resolved First, It is necessary for War purposes that the lands described in Exhibit "A" be acquired by condemnation proceedings and in connection therewith that the immediate right to occupy, use and improve such lands be granted.

Resolved Second, The Secretary or Assistant Secretary of this Corporation be and hereby are authorized and directed to request the Attorney General of the United States to cause the necessary proceedings to be instituted for the condemnation of such lands and further, to cause the necessary action to be taken to procure a court order granting immediate right to [73] occupy, use and improve the lands described in Exhibit "A", pursuant to the provisions of the Act of Congress approved March 27, 1942 (Public Law 507, 77th Congress) and Executive Order 9217, issued by the President of the United States on August 7, 1942, by virtue of and in pursuance to authority vested in him pursuant to said Public Law 507, 77th Congress, *supra*.

Resolved Third, That the General Counsel or an Assistant General Counsel of this Corporation is hereby authorized and directed to take all necessary and appropriate action to carry out the instructions and authorizations provided in this resolution.

* * * * *

The foregoing resolution was duly adopted by the Board of Directors of Reconstruction Finance Corporation on the 18th day of September, 1942.

(Seal)

LEO NIELSON

Secretary

Reconstruction Finance Corporation
Plancor 1406 [74]

RECONSTRUCTION FINANCE CORPORATION
Washington

September 19, 1942

The Honorable Francis Biddle
Attorney General of the United States
Washington, D. C.

Dear Sir:

In connection with the establishment of a reservoir for the storing and conservation of natural gas (Playa Del Rey Natural Gas Storage Project, Plancor 1406) by Defense Plant Corporation, a corporation created pursuant to Section 5(d) of the Reconstruction Finance Corporation Act, as amended, to relieve a shortage of gas which would impede the war effort, this Corporation has determined that it is necessary for war purposes to acquire certain lands situated in the City of Los Angeles, State of California.

Therefore, pursuant to the provisions contained in the Act of Congress approved January 22, 1932 (15 U. S. C. 601-617) as amended, and Public Law 507, 77th Congress approved March 27, 1942, and Executive Order 9217 issued by the President of the United States on August 7, 1942, by virtue of and pursuant to authority vested in him by Title II of the Second War Powers Act 1942, approved March 27, 1942 (Public Law 507, 77th Congress) authorizing Reconstruction Finance Corporation to acquire and dispose of property deemed necessary for military, naval or other war purposes, it is requested that you cause the necessary proceedings to be instituted for the acquisition of the lands described in the enclosed Exhibit "A". The estate to be acquired is the full fee simple title subject to existing easements for public utilities.

You are advised that it is vital to the successful prosecution of the war that the United States be granted the immediate right to occupy, use and improve the lands described in Exhibit "A". It is, therefore, requested that you cause the necessary action to be taken to procure an order from the court granting the United States the immediate right to occupy, use and improve said lands pursuant to the provisions of the Act of Congress approved March 27, 1942 (Public Law 507, 77th Congress) and Executive Order 9217.

Arrangements have been made for the procurement of title evidence covering the lands to be condemned. Such title evidence will be made available to the United States Attorney. [75]

The Honorable Francis Biddle

Page 2

There are enclosed three copies of a description of the lands to be condemned entitled Exhibit "A" and three copies of a plat showing the location of said lands to be condemned.

Very truly yours,

LEO NEILSON (signed)
Assistant Secretary

Enclosures

WJR:eb

Pursuant to T. 28 U. S. Code, Sec. 661, I certify this to be a true copy of the original record in this Department.

(Seal)

J. EDWARD WILLIAMS
Acting Head, Lands Division
Department of Justice [76]

EXHIBIT B

AMENDATORY RESOLUTION

Whereas, This Corporation at the request of Defense Plant Corporation, has caused condemnation proceedings to be instituted in the name of the United States for the purpose of obtaining title to certain lands required as a storage reservoir for natural gas (Playa Del Rey Natural Gas Storage Project—Plancor 1406), which lands are described in the Exhibit 'A' attached to the Declaration of Taking forwarded to the Department of Justice on October 22, 1942; and

Whereas, Defense Plant Corporation has taken possession of and desires to acquire by condemnation title to certain machinery and equipment located upon said lands and has requested this Corporation to request the Department of Justice to amend the petition filed for the condemnation of said lands so as to include certain machinery and equipment located upon the said land, which machinery and equipment is described in the attached Exhibit 'C'.

Resolved, That the resolution adopted by the Board of Directors of this Corporation on September 18, 1942, as amended, be and hereby is further amended by adding thereto a Resolved Seventh and Resolved Eighth to read in full as follows:

'Resolved Seventh, That it is necessary and advantageous in carrying out the authority vested in Defense Plant Corporation to acquire by condemnation the machinery and equipment described in said Exhibit 'C'.

'Resolved Eighth, That the Secretary or an Assistant Secretary of this Corporation be and hereby is authorized and directed to request the Attorney General of the United [77] States to take such action as may be necessary for the acquisition by condemnation of the machinery and equipment described in said Exhibit 'C'.

* * * * *

The foregoing resolution was duly adopted by the Board of Directors of Reconstruction Finance Corporation on the 4th day of October, 1943.

Seal

/s/ A. T. HOBSON

Secretary

Reconstruction Finance Corporation [78]

RECONSTRUCTION FINANCE CORPORATION
Washington

October 6, 1943

Honorable Francis Biddle
Attorney General
Department of Justice
Washington, D. C.

Re: Plancor 1406—Playa Del Rey Gas Storage Project
(U. S. v. Certain Parcels of Land in the City and
County of Los Angeles, California, et al.,
No. 2454-B, Civil.

Dear Mr. Attorney General:

On September 19, 1942 this Corporation requested you to institute condemnation proceedings for the acquisition

of certain land situate in Los Angeles County, State of California, in accordance with the provisions of Public Law 507—77th Congress and Executive Order 9217.

The proper operation of the project for which lands are being acquired will necessitate the acquisition of the machinery and equipment described in the attached Exhibit "C" which was located upon the lands taken and is owned ostensibly by the owners of said land. It is requested that you cause the necessary action to be taken for the acquisition of the machinery and equipment described in the attached Exhibit "C" in addition to the lands described in the Declaration of Taking which has been filed in the above-entitled proceeding.

Arrangements have been made for the procurement of evidence as to the ownership of said machinery and equipment and such evidence will be made available to the United States Attorney for the Southern District of California.

Very truly yours,

Seal

A. T. Hobson (signed)

Secretary

Pursuant to T. 28 U. S. Code, Sec. 661, I certify this to be a true copy of the original record in this Department.

J. EDWARD WILLIAMS

Acting Head, Lands Division

Department of Justice [79]

EXHIBIT C

IRL D. BRETT

Special Assistant to

the Attorney General

808 Federal Building

Los Angeles 12, California

MAdison 7411, Ext. 221

Attorney for Plaintiff.

In the District Court of the United States

In and for the Southern District of California

Central Division

No. 2454-B Civil

United States of America, for the use of Reconstruction Finance Corporation, a Federal Corporation, acting in behalf of Defense Plant Corporation, a Federal Corporation, Plaintiff, vs. Certain Parcels of Land in the City of Los Angeles, County of Los Angeles, State of California; City of Los Angeles, a municipal corporation; County of Los Angeles, a body politic and corporate; State of California, a corporation sovereign; Associated Land Owners, Inc., a corporation, et al., Defendants.

INVENTORY OF THE PROPERTY AND EQUIPMENT REFERRED TO IN PARAGRAPHS XIII, XIV AND XV OF THE FIRST AMENDED COMPLAINT FILED HEREIN, AND WHICH IS TO BE ACQUIRED BY CONDEMNATION IN THE ABOVE ENTITLED ACION. [80].

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Union Oil Company of California

Inventory of Materials and Supplies Taken Over by
Defense Plant Corporation—September 29, 1942.

SAMARKAND OIL COMPANYSamarkand Well #1

<u>Quantity</u>	<u>Description</u>
1	Lot Misc. Junk pipe and fittings
1	128' Ideco Steel Derrick
1	Regan Crown Block
1	Rod Board
1	Radigan Carrier Bar
1	Radigan Horse Head
1	Wood Walk Beam
1	Pitman
1	Crank Complete w/con. bal. weights
1	Theolite Pump complete
1	Imperial Stuffing Box
1	3" Steel Tee
1	3" HP Steel Tee
2	3" Crane Malb. Tees
1	2 1/2" Crane Chuck Valve
1	3" Kew Union
1	3" Steel Bull Plug
1	1/2" Valve
1	1/2" Nipple
1	3" x 8" Nipple
1	3" x 17" Nipple
18'	3" Lead Line
1	3" HP Steel Union
1	3" Bull Plug
1	3" x 6" Nipple

<u>Quantity</u>	<u>Description</u>
1	2" Tee
1	2" x 3" Swedge
1	2" x 1" Bushing
1	2" Clip Gate
1	2" x 1 1/2" Bushing
1	1 1/2" x 3/4" Bushing
1	Wooden Band Wheel
1	12" x 95' Belt
1	Crank Shaft Base complete w/belt pulley
1	5' 6" Tex Rope Pulley
1	4 Cyc. Buda YR-425 w/7 Tex Rope Pulleys
4	Tex Ropes
1	3' 11" Belt Pulley
1	3" Ell
1	3" Kew Union
2	3" Clip Gates
3	3" Steel Tees
1	3" Ell
1	3" x 2" Bushing
1	3" C. L. Plug
1	2" x 4" Nipple
1	3" Tee
1	3" Bull Plug
1	3" x 6" Nipple
1	3" Crane 1600# Gate
2	3" x 8" Nipples
1	3" Tee
1	3" x 10" Nipple [82]

QuantityDescriptionSamarkan Well #1 (Continued)

2	3" Bolt H P Union
1	3" x 2' 8" Nipple
2	3" Tees
1	3" Darling 1600# Valve Gate
1	3" x 4" Nipple
1	3" x 6" Nipple
1	3" x 8" Nipple
13'	3" Line Pipe—Suction
10'	3" Line Pipe—Suction
20'	3" Line Pipe—Suction
10'	4" Line Pipe
1	3" Kew Union
2	3" x 6" Nipples
1	3" Clip Gate
1	3" Bull Plug
1	3" Gate ?
1	3" x 4" Nipple
1	3" Tee
1	3" Plug
1	3" x 2" Swedge
2	3" x 6" Nipples
1	2" H. P. Tee
1	2" Bull Plug
1	2" Ell
1	2" Tee
1	2" x 8" Nipple
1	2" Clo Nipple
1	2" Kew Union
1	2" x 24" Nipple
1	2" Ck. Valve

<u>Quantity</u>	<u>Description</u>
1	2" x 6" Nipple
1	2" Tee
1	2" Steel Bull Plug
2	2" x 10' Nipple
2	2" Ells
1	2" x 4" Nipple
1	3" x 6' Pipe
1	2" x 22' Pipe
1	2" Tee
1	2" Plug
1	2" Gate—in cellar
1	2" x 12" Nipple
1	2" x 10" Nipple
1	2" x 6" Nipple
3	2" Ells
3	2" Tees
4	2" Kew Unions
3	2" Clip Gates
1	2" Gate—in cellar
2	2" x 6" Nipples
1	2" x 4" Nipple
1	2" x 12" Nipple
23	2" Pipe
1	2" x 8" Nipple
8	2" Pipe
1	6 5/8" Landing Clamp
1	6 5/8" Nipple 3' long
1	H. P. Pump Head ? make
1	4" Drill Pipe Collar [83]

QuantityDescriptionSamarkand Well #1 Continued

1	4" x 2" Swedge
1	4" x 3" Swedge
1	4" x 10" Nipple
1	4" x 3" Nipple
1	4" Line Pipe Collar
1	3" Line Pipe Collar
1	3" Tee—oil line to Tanks
1	3" C. I. Plug
1	3" H. P. Union
1	3" Steel Bull Plug
1	2" Tee
1	2" Plug
1	3" Valve ? make
549'	3" Line Pipe (approx.)—mostly buried
4	3" Ells
3	3" Brass Valves—Tank Setting
3	3" Kew Unions
3	3" Tees
2	3" x 6" Nipples
1	3" x 12" Nipple
2	3" x 48" Nipples
1	3" Bull Plug
1	3 x 6 Swedge Nipple
1	1/2" Glo Valve
1	3" x 4" Swedge
2	4" Tees
1	3" x 6" Nipple
1	3" x 10" Nipple
1	3" x 12" Nipple
1	3" Tee

<u>Quantity</u>	<u>Description</u>
1	3" x 8" Nipple
1	3" Std. Union
1	4" C. I. Plug
1	4" x 16" Nipple
2	4" x 8' Nipples
1	4" Std. Flange Union
1	4" Ell
1	4" Crane Flg. Gate Valve 125#
1	4" x 6" Nipple
1	4" x 16" Nipple
3	4" Ells
1	4" x 28" Nipple
1	4" x 27" Nipple
1	Wilgus Gas Regulator
2	1/4" Valves
1	1/4" Ell
1	1/4" Union
1	1/4" Tee
3'	1/4" Pipe
2	1/4" x 6" Nipples
1	Trumble Gas Trap WM 276
126'	4" Line Pipe (Gas)
1	3" x 17" Nipple
1	3" Crane Gate 125#
1	3" x 4" Swedge 24" long
1	4" Fairbanks Ck. Valve
1	4" x 3" Bushing
1	3" x 4" Nipple
2	3" Kew Unions [84]

QuantityDescriptionSamarkand Well #1 (Continued)

78'	3" Line Pipe
2	3" Tees
2	3" Bull Plugs
8'	3" Pipe
1	6" x 13" Swedge
2	1" Valve
3	1/2" Valves
3	1/2" x 4" Nipples
4	1/2" Ells
47'	1/2" Pipe
1	1" Plug
2	1" Valves
1	1" Ell
1	1" Kew Union
1	6" x 2" Swedge
2	2" Kew Unions
3	2" Tees
1	2" Bull Plug
20'	2" Pipe
2	2" Clip Gates
1	2" x 6" Nipple
2	2" x 4" Nipples
1	2" x 1/2" Bushing
1	1/2" H. P. Valve
1	1/2" Ell
2	1/2" x 6" Nipples
1	2" x 6" Nipple
1	2" Kew Union
7'	2" Pipe
1	2" Tee

<u>Quantity</u>	<u>Description</u>
1	2" x 1" Bushing
1	1" Valve
3	2" Ells
5	2" Tees
2	2" Plugs
1	2" x 6" Nipple
1	2" Ell
2	2" Bull Plugs
1	2" Kew Union
1	2" x 6" Nipple
4	2" x 4" Nipples
1	2" Clip Gate
47'	2" Pipe
1	2" Valve
2	2" x 4" Nipples
2	2" Ck. Valve
2	2" 45 Ell
1	2" x 6" Nipple
2	2" Kew Unions
24'	2" Pipe
1	2" x 6" Nipple
1	2" Tee
1	2" Plug
2	2" Clip Gates
2	2" Kew Unions
30'	2" Pipe
2	2" x 4" Nipples
1	2" Kew Union
1	2" x 2" Nipple [85]

QuantityDescriptionSamarkand Well #1 (Continued)

1	2" Steel Bull Plug
1	2" Tee
1	2" x 8" Nipple
1	2" x 1" Bushing
1	1" x 1/2" Swedge
1	1/2" Kew Union
1	1/2" x 2" Nipple
1	1/2" Valve
75'	1/2" Pipe
32'	3" 8 th. Line Pipe
1	3" Kew Flg. Union
1	3" E. H. Malb. Tee
1	3" x 6" Nipple
1	3" x 1 1/4" Malb. Reducer
1	1 1/4" x 3" Nipple
1	1 1/4" x 1" Malb. Reducer
1	1" Std. Brass Gate Valve
130'	3" 8 th. Line Pipe
1	3" Std. Malb. St. Ell
1	3" E. H. Malb. Tee
1	3" x 4" Nipple
1	3" N. R. S. Gate Valve
2	3" x 12" Nipple
1	3" Std. Malb. Tee.
1	3" Bull Plug
1	3" x 4" Nipple
1	3" Rapid Tank Flange

<u>Quantity</u>	<u>Description</u>
1	3" R R Union
425'	3" Line Pipe 8 th.
1	3" Kew Union
1	3" x 12" Nipple
1	3" Clip Gate
1	3" x 10" Nipple
1	4" x 3" Forged Steel Cross
2	3" E. H. Hyd. N. R. S. Gate Valve
2	4" E. H. Hyd. N. R. S. Gate Valves
2	3" E. H. Steel Tees
2	4" x 3" Steel Bull Plugs
2	4" Shaffer Floor Beams
1	4" Hughes Gate Valve
200'	2" Line Pipe
1	2" R R Union
4	2" Ells
1	2" E. H. Brass Gate Valve
750'	12 3/4" Casing—Estimated
6400'	6 5/8" Casing—Estimated
250'	4 3/4" Liner—Estimated
	Sub surface equipment records not available September 29th, 1942.
6300'	2 1/2" Upset tubing—Approximately
2100'	7/8 x 30 Sucker Rods—Approximately
4200'	3/4 x 30 Sucker Rods—Approximately
1	Dbl. Ball Nielson Pump [86]

Items Deleted from Original Inventory as Indicated
as Not Being Needed in Playa Del Rey Project

SAMARKAND

<u>Quantity</u>	<u>Description</u>
1	Regan Crown
1	Regan 4 sheave travel block
1	850' Casing Line
1	Calf Wheel complete w/cat head, clutch and sprockets
1	Dehydrating Unit
1	Home made heater
2	6" Rapid Tank Flanges
4	6" x 6" Nipples
3	6" Std. Malb. Ells
2	6" x 10" Nipples
2	6" Std. Malb. Bull Plugs
3	6" Std. Malb. Tees
2	6" x 10" Nipples
8	6" Std. F. S. Comp. Flanges
100'	6" Line Pipe
1	3" x 10" Nipple
210'	5 9/16" connected drill pipe
1	6" Std. O S & Y Gate Valve
1	5" x 4" Swedge
1	4" x 8" Nipple
1	4" Kew Flg. Union
2	4" Std. Malb. Tees
1	4" Bull Plug
40'	4" 8 th. Line Pipe
3	4" Std. Malb. Ells
1	4" N. R. S. Gate Valve
1	4" G H Malb. Tee

<u>Quantity</u>	<u>Description</u>
1	4" x 4" Nipple
1	4" x 4" Nipple
2	4" x 12" Nipples
200'	3" Line Pipe
1	3" Std. N. R. S. Gate Valve
2	3" R R Union
1	3" Clip Gate
1	3" Kew Union
2	1500 Bbl. Double bolted 3 ring cone top tanks w/ stairway
52 Jts.	4 1/2" Drill Pipe w/tool jts.
48 Jts.	5 9/16" Drill Pipe w/tool jts.
1	8 5/8" Overshot w/wash pipe
1	24" Conductor Pipe
122 Jts.	4 1/2" Drill Pipe
176 Jts.	3 1/2" Drill Pipe
1	4 1/4" x 50' Kelly
1	4 1/4" x 30' Kelly
1	6 1/4" x 50' Kelly
2	5 9/16" Drill Collars (30')
1	4 1/2" Drill Collars (10') short
1	Shop made hoist "Emsco" w/1240 sprocket 9 3/4" break band
1	#3426 Draw works
1	4 1/2" Swivel tubing block
1	#12 Rotary machine
1	Emsco 2 sheave 24" tubing block
1	6" type "A" Swivel [87]

Items Deleted from Original Inventory as Indicated
as Not Being Needed in Playa Del Rey Project

Samarkand Continued

<u>Quantity</u>	<u>Description</u>
1	12 1/2" Solid Spider
1	Fordson motor mounted on 5 1/2" x 18"- x 1/2" I Beams shop made
1	2 1/2" 30' Rotary Hose
1	14' Single sheave snatch block
1	Nuttal Reduction Gear
1	Westinghouse Oil Well Motor 35-65 HP, Frame #7680, Style #489275, Serial #4839003-440 Volts
1	Westinghouse Oil Well Motor 35 HP, Frame 6620, Style 512097, Serial \$4788046, 440 Volts
2	2 1/2 Gal. Fire Ext.
1	Westinghouse Oil Well Motor 75 HP, Frame 752G, Style 512095, Serial \$ 4732197
1	Westinghouse Grid w/controller type "S" Frame 50 Style 515442, Control- ler type "S" Frame #50 Style #S- 019E604
1	Tool Box
1	15'3" x 17'6" Mud Tank

<u>Quantity</u>	<u>Description</u>
2	7¼ x 14 Power driven Gardner Denver pumps
1	Westinghouse Oil Well Motor 25-55 HP Frame 7620 Style 489275 Serial 482-4930—440 Volts
2	Westinghouse Grid w/Controller style "S" Frame #50 Style 515442
1	Panel Board 4 switches
1	Emsco Rotary Machine
1	5 sheave Regan 54" Casing Block
1	Shop made hoist w/6 cylinder motor
1	16-3/4" Fish tail bit
1	16-3/4" Fish tail bit
1	7 sheave high deck Regan Crown Mud end for 14-7¼ Gardner Denver Pump
1	12-3/4" Steel Drill Gate Valve
1	10" Steel Gate Valve
1	10" Flg. Steel Cross w/6" outlets
1	6" type G. S. Swivel
1	12' x 16' Corg. Iron Bldg. w/wood frame
1500'	1¼" Wire Line
6000'	9/16" Sand Line
2	Steel Cat wheels
1	Lot Misc. Junk [88]

Union Oil Company of California

Inventory of Materials and Supplies Taken Over by
Defense Plant Corporation—September 29, 1942.

TREASURER OIL COMPANY

2600 Washington Blvd., Venice, Calif.

<u>Quantity:</u>	<u>Description:</u>
	Treasurer Well #1
1	122' Emsco derrick w/ reinforcements
1	3 Sheave Pump Crown
1	Westinghouse Oil Well Motor 30-50 HP, Frame #7526, Style 489274, Serial 4717084
1	Grid w/ controller Westinghouse Style "S", Frame 40 Style So 19 D 227
1	Square D Safety Switch 20 HP, Cat. #463420
1	Trumball Switch Type A.G., 3 Pole, 50 HP, Cat. #575 AC
1	Lacy Pump Unit type OD60, Ser. #76
1	Manzel Tritolite Pump
164 Jts	2½" Upset 8 th. Tubing R-2 standing in derrick
6 Jts	2½" Upset 8 th. Tubing R-2 on rack
5 Jts	2½" Upset 8 th. Tubing R-1 on rack
9	¾" x 30 Rods
5	7/8" x 30 Rods
175	¾" x 30 Rods
67	7/8" x 30 Rods
150'	1" Gal. Conduit
3	14" Reflectors

<u>Quantity</u>	<u>Description</u>
6	½" Conduit outlets
1	1¼" Radgan Polish Rod
1	3" Oil Well Stuffing Box
1	1" x 6" Nipple
1	1" Std. Brass Gate Valve
1	1" Malb. St. Ell
1	1" x 12" Nipple
2	2½ Gal. Foamite Fire Ex.
25'	¼" Copper Tubing
4	¼" Copper Tubing Connections
1	3/8" R R Union
1	3/8" Brass Swing Ck. Valve
2	3/8" Brass Stop Cock
2	3/8" Malb. Ells
2	3/8" Malb. St. Ells
1	3/8" Malb. Tee
3	3/8" x 4" Nipples
4	½" Malb. Tee
1	½" 45° Ell
1	½" Malb. Ell
1	½" Std. Brass Gate Valve
2	1" x ½" Bushing
1	1" Malb. Tee
1	1" Std. Gate Valve
2	1" Malb. Ells
1	1" R R Union
1	1" Clip Gate
3	1" x 6" Nipples
20'	½" Blk. Pipe [89]

QuantityDescriptionTreasurer Well #1

1	1/2" Rld. Union
3	1/2" Std. Brass Gates
1	1/2" St. Ell
3	1/2" Std. Malb. Tees
1	1/2" Std. Malb. Union
1	1/2" Std. Angle Gate Valve
1	3/4" Clip Gate
2	1" Brass Gate Valves
1	3/4" Std. Brass Swing Ck. Valve
1	Master Motor 1/4 HP, type RA, Frame 5820, Serial MD 1144, Style 42540
1	3" Fg. Steel Cross
2	3" Hughes St. Gate Valves
1	3" Derling Hyd. Gate Valve
1	3" Shaffer Flow Beam
1	3" Jefferson Union
1	3" Std. Swing Ck. Valve
5	3" Std. Malb. Tees
1	3" Bull Plug taped 1/2"
1	3" x 4" Nipple
4	3" x 12" Nipples
1	3" Bull Plug
2	3" Clip Gates
2	3" x 6" Nipples
1	3" Kew Union
1	3" C. I. Plug
2	1/2" Std. Brass Gate
5'	3" 8 th. Line Pipe
1	2" E. H. Swing Ck. Valve
1	2" N.R.S. Gate Valve

<u>Quantity</u>	<u>Description</u>
2	2" E. H. Ells
2	2" E. H. Malb. Tees
1	2" Std. Brass Gate
4	2" x 6" Nipples
2	2" x 10" Nipples
1	2" x 4" Nipple
15'	2" Line Pipe
1	2" Std. Malb. Cross
1	2" Med. Brass Gate
1	2" Clip Gate
2	2" Malb. Ells
1	2" Rld. Union
3	2" x 4" Nipples
1	2" x 3" Nipple
3	2" x 8" Nipples
1	2" C. I. Plug
1	2½" x 2" Swedge
1	2½" Std. Malb. Ell
12'	2½" Line Pipe
1	3" x 3" Nipple
1	3" Rld. Union
2	3" x 18" Nipples
1	3" Clip Gate
1	3" E. H. Malb. Tee
50'	3" Line Pipe
2	3" N.R.S. Gates
1	3" Rld. Union
4	1" Std. Malb. Tee
10'	1" Line Pipe [90]

QuantityDescriptionTreasurer Well #1

60'	3" Line Pipe
50'	2½" Line Pipe
50'	1" Line Pipe
1	2" E. H. Malb. Tee
1	2" Std. Malb. Tee
1	1½" Std. Malb. Tee
1	1½" Rld. Union
1	1¼" Rld. Union
1	2" x 1¼" Bushing
1	2" x 1½" Bushing
1	G. E. Motor ½ HP, Model #29074, Frame 1455, Type R.S.A.
1	Cent. Pump 1½" Suction, 1¼" Dis- charge
1	2" Std. Brass Swing Ck. Valve
3	2" Std. Malb. Tees
1	2" Clip Gate
1	3" x 2" Swedge
2	2" x 6" Nipples
1	2" x 4" Nipple
5	3" Std. Malb. Tees
2	3" x 6" Nipples
1	3" x 8" Nipple
1	3" x 10" Nipple
1	3" x 12" Nipple
1	3" x 18" Nipple
1	3" x 4" Nipple
3	3" Clip Gates
1	3" Std. N.R.S. Gate
1	3" Med. N.R.S. Gate

<u>Quantity</u>	<u>Description</u>
1	3" Std. Bull Plug
2	1/2" Clip Gates
2	1/2" Malb. Ells
3	1/2" x 6" Malb. Ells
3	1/2" x 4" Malb. Ells
1	Trumble Gas Trap Model "E" w/ Slide Valve
6	3" Std. Malb. Tee
2	3" Std. N.R.S. Gates
1	3" O S & Y Gate
1	3" Std. Swing Ck. Valve
3	3" Crane Unions
2	3" Bull Plugs
2	3" C. I. Plugs
2	3" x 4" Nipples
2	3" x 6" Nipples
1	3" x 8" Nipple
1	2" Clip Gate
1	2" Std. Malb. Tee
2	2" Std. Malb. Ell
1	2" x 6" Nipple
1	2" x 8" Nipple
1	2" x 18" Nipple
1	2" Rld. Union
12'	2" Line Pipe
436'	3" Line Pipe
4	3" Std. Malb. Tees
2	3" E. H. Malb. Ells
4	3" C. I. Plugs
2	2" Std. Malb. Ells
125'	2" Line Pipe [91]

<u>Quantity</u>	<u>Description</u>
	<u>Treasurer Well #1</u>
190'	2" Line Pipe
750'	1" Line Pipe
345'	1½" Galv. Line Pipe
125'	3" Line
50'	2" Line
100'	2" Line
130'	6" Line
60'	2" Pipe
60'	6" Line
60'	2" Line Pipe
1	2" Clip Gate
52	50# sacks #2 salt
14 gals	Lubricating oil, S A E 30 Standard Zer- dene
37 gals (est.)	Dehydrating Comp. #675
9	Single tripper barrels
106 gals	Gaso. grade and brand unknown
32 gals (est.)	Lubricating Oil, Standard oil, SAE un- known
53 gals (est.)	Dehydrating Comp. #675
50'	½" Line
60'	¾" Line
1	¾" Std. Brass Gate Valve
1	1" Std. Brass Gate Valve
1	1" x ¾" Reducing Tee
35 gals (est.)	W-25 Tretolite
125'	2" Line ^c
165	2" Line
1	2" Upgate
750'	12-¾" Casing—Estimated

<u>Quantity</u>	<u>Description</u>
6400'	6-5/8" Casing—Estimated
250'	4-3/4" Liner—Estimated
	Sub surface equipment records not available September 29, 1942.
6300'	2½" Upset Tubing—Approximately
2100'	7/8" x 30' Sucker Rods—Approximately
4200'	3/4" x 30' Sucker Rods—Approximately
1	Dbl. Ball Nielson Pump [92]

Items Deleted from Original Inventory as Indicated
as Not Being Needed in Playa Del Rey Project

<u>Quantity</u>	<u>Treasure</u> <u>Description</u>
1	Emsco pulling machine w/ Pacific Gear s27c
1	Grid w/ Westinghouse controller Style "S", Frame #40, Style 8015B679
1	Westinghouse Oil Well Motor 25-65 HP, Style 7620, Serial #4670407
500'	1" Tubing Line
1	Shop Made Heater
2	1" Std. Brass Gates
1	1" Rld. Union
40'	1" Blk. Pipe
2	2" Malb. Tees
1	2" 45° Ell
2	2" Rld. Unions
1	2" Brass Swing Ck. Valve
1	2" Clip Gate
1	2" x 4" Nipple

<u>Quantity</u>	<u>Description</u>
2	2" x 6" Nipples
11	2" Clip Gates
8	2" Rld. Unions
4	2" x 6" Nipples
3	2" x 4" Nipples
5	2" x 8" Nipples
10	2" Std. Malb. Tees
11	2" Std. Malb. Ells
5	2" Rapid Tank flanges
2	3" Rapid Tank Flanges
4	2" x 6" Nipples
2	2" x 10" Nipples
2	2" x 12" Nipples
1	6" x 4" Swedge
1	6" Med. N. R. S. Gate
1	4" x 8" Nipple
3	1/2" Std. Brass Gates
1	750 Bbl. Bolted water sealed deck tank w/ steel stairs
1	2" Brass Stop Cock
1	2" Kew Union
1	2" x 1" Reducer
1	1" Std. Brass Gate
1	1" Union
1	1" Union
1	1" Ell
3	1" Tees
2	1" Clip Gates
1	1" Std. Brass Gate
2	1" x 6" Nipples
4	1" x 4" Nipples
1	6" Rapid Tank Flange

<u>Quantity</u>	<u>Description</u>
3	2" Rapid Tank Flanges
1	2 1/2" Rapid Tank Flange
1	3" Rapid Tank Flange
1	6" x 4" Swage
1	4" Med. N. R. S. Std. Gate Valve
1	4" x 8" Nipple
3	1/2" Std. Grass Gate Valves
3	2" Clip Gates [93]

Items Deleted from Original Inventory as Indicated
as Not Being Needed in Playa Del Rey Project

Treasure Continued

<u>Quantity</u>	<u>Description</u>
1	1" Clip Gate
1	1" Brass Stop Cock
4	2" x 6" Nipples
2	2" Std. Malb. Tees
1	2" R R Union
2	3" x 6" Nipples
2	3" Kew Unions
1	3" Std. N. R. S. Gate Valve
20'	6" line
1	3" x Hvy. Malb. Tee
1	3" Std. Malb. Tee
1	3" Bull Plug
1	3" Std. Malb. Ell
8	3" Std. Malb Tees
2	3" x 2" Swage Nipples
1	2" R. R. Union
3	2" Clip Gates

<u>Quantity</u>	<u>Description</u>
1	1" Clip Gate
2	3" Kew Unions
2	3" Std. Malb Ells
1	3" 45° Std. Malb. Ell
2	2" R R Unions
1	3" Clip Gate
1	3" Std. N. R. S. Scd. Gate Valve
1	3" R. R. Union
2	3" Std. Malb. Tees
1	3" Std. Malb Ell
1	3" x 2" Swage Nipple
6	3" x 6" Nipples
5	3" x 4" Nipples
2	2" R R Unions
1	2" Std. Malb Ell
1	2" Std. Malb Tee
12'	3" Line
1	3" Med. N. R. S. Gate Valve
1	3" Std. N. R. S. Gate Valve
3	3" R. R. Unions
2	3" Std. Malb Tees
3	3" x Hvy. Malb. Tees
3	3" x 4" Nipples
1	3" x 12" Nipples
2	3" x 8" Nipples
3	3" x 18" Nipples
1	3" x 4" Swage
1	4" x Hvy. Malb. Tee
1	Shop made water heater 24" CD x 12' (N. G.)
50'	1" Pipe

<u>Quantity</u>	<u>Description</u>
1	1000 bbl. welded steel tank w/cone to, & steel stairway
1	2" Clip Gate
1	2" R R Union
2	2" Std. Mall Tees
2	2" x Hvy. Mall Ells
1	4" x 3" Bushing
1	4" R R Union [94]

Items Deleted from Original Inventory as Indicated
as Not Being Needed in Playa Del Rey Project

Treasure (continued)

<u>Quantity</u>	<u>Description</u>
1	4" Std. Mall Tee
1	4" Clip Gate
3	4" x 6" Nipples
1	4" x 4" Nipple
3	500 bbl. single bolted steel tanks w/ water sealed deck, 2 w/ steel ladders 1 w/ steel stairway
3	2" Clip Gates
3	2" Std. Mall Tees
3	2" Std. Mall Ells
3	2" x 6" Nipples
2	2" x 4" Nipples
5	2" rapid tank flanges
1	4" rapid tank flange
1	2" Clip Gate
1	2" R R Union
5	1/2" Std. Brass Gate Valves

<u>Quantity</u>	<u>Description</u>
1	1½" Std. Brass Glo Valve
1	2" Std. Brass Gate Valve
1	6" x 4" Swage Nipple
2	4" Std. N. R. S. Gate Valve
1	4" x 6" Nipple
1	4" x 8" Nipple
1	4" x 4" Nipple
1	4" Kew Union
2	4" Std. forged steel comp. flanges
40'	1½" Pipe
20'	4" Line Pipe
1	4" 45° Std. Mall Tee
1	4" Kew Union
2	4" Std. N. R. S. Gate Valves
2	4" x 8" Nipples
32'	6" Line Pipe
28'	5" Line Pipe
1	6" Std. N. R. S. Flanged Gate Valve
2	6" Std. forged steel comp. flanges
1	4" Universal
1	3" quick opening valve
2	4" x 3" Swage
1	4" Std. Mall Tee
15'	4" Line Pipe
20'	2" Pipe
1	4" x Hvy. Mall Ell
1	4" Std. Mall Tee
1	4" x 6" Nipple
1	4" Bull Plug
2	4" x Hvy. forged steel comp. flanges
30'	6" Line
1	2" Clip Gate

<u>Quantity</u>	<u>Description</u>
1	2" x 12" Nipple
1	2" Std. Mall Tee
1	2" Std. Mall Ell
1	2" R R Union
60'	2" Line
50'	2½" Line
1	6" x 4" Swage
1	4" x Hvy. N. R. S. Gate Valve [95]

Items Deleted from Original Inventory as Indicated
as Not Being Needed in Playa Del Rey Project

Treasure (continued)

<u>Quantity</u>	<u>Description</u>
1	4" Std. Mall Tee
1	4" Bull Plug
1	4" Kew Union
1	4" x 4" Nipple
1	4" x 3" Nipple
3	½" Std. Brass Gate Valves
15'	½" Pipe
1	3" Kew Union
1	2" R R Union
1	3" Std. N. R. S. Gate Valve
1	3" x 10" Nipple
1	3" rapid tank flange
2	2" Clip Gates
2	2" R R Unions
1	2" Std. Mall Tee
4	2" Clip Gates
3	2" Std. Mall Ells

<u>Quantity</u>	<u>Description</u>
4	2" Std. Mall Tees
2	2" R R Unions
4	2" x 4" Nipples
4	2" x 6" Nipples
1	4½" x 2-3/4" x 4" Gardner Denver Duplex Steam Pump #21899
1	3 shive tubing block
1	7" Wigle Hook
1	7'6" x 7'6" x 21' cooling tower with two 2" coils and 21' 1½" pipe
1	5" BRIB 300# ammonia gauge
1	5" BRIB 150# ammonia gauge
1	American Ice Machine Compressor
1	3/8" Crane Hvy. steel needle point Gate Valve
1	3/8" Steel Edwards Needle Point Gate Valve
1	3/8" Vogl Steel Needle point Gate Valve
1	3/4" x Hvy. Steel Tee
1	3/4" x Hvy. Steel Ell
5'	1" Pipe
4'	3/4" Pipe
1	10 HP Westinghouse Motor 440 Volt #2620836
1	6" Six Groove "C" pulley
1	24" 4 groove split pulley

<u>Quantity</u>	<u>Description</u>
1	Centrifugal pump with 1¼" inlet and outlet
1	Oil container 4' x 6'6" x 2' with 2 ammonia coils complete w/ fittings
1	Surge Chamber 10" OD—10' long, two 2" x 4" nipples and one 2½" collar welded on.
1	Ammonia receiver 12-3/4" OD, 46½" long, welded heads, complete w/ fittings
70'	3" Pipe
120'	2" Pipe
120'	2" Pipe
1	2" Clip Gate
2	2" Mall Ells
1	2" Mall Tee
20'	3" Pipe
50'	2½" Pipe
70'	2" Pipe
1	2" Mall Tee [96]

Items Deleted from Original Inventory as Indicated
as Not Being Needed in Playa Del Rey Project

Treasure (continued)

<u>Quantity</u>	<u>Description</u>
1	2" Mall Ell
50'	2" Pipe
1*	2" Std. Mall Cross
1	2" R R Union
1	2" x 1" Reducer
2	3" x Hvy. Mall Ells
2	3" Std. Mall Ells
1	3" x Hvy. 45° Mall Ells
1	3" Std. 45° Mall Ells
2	3" Std. Mall Tees
1	3" Kew Union
4	3" x 3" Nipples
2	3" x 6" Nipples
1	3" close nipple
5	3" Line Pipe Couplings
1	3" Block Bull Plug
21'	3" Line
1	Steel Std. end complete w/ jack post, sampsom post, headache post
1	12' steel band wheel, 6" shaft & wood cant rim w/ band wheel clutch sprocket
1	Frame for Std. engine with 14" x 20" pulley and fly wheel w/ balanced rim & 7" band for belt.
1	14" x 30" x 26' wood beam

<u>Quantity</u>	<u>Description</u>
1	Junk 500 bbl. steel bolted tank
1	Steel Pitman with 2½" stirrup
1	Building 8' x 16 Galv. Corrugated iron with wood frame and floor
1	2 ring stl. bolted tank 1000 bbl. (?) w/ ladder on Calabar on lot 42 and block 30
2	2" N. R. S. Gate Valve
4	2" x close nipples
2	3" x 2" Red. Unions
30'	3/4" Pipe
2	3/4" Gate Valve
2	3/4" Ells
1	1" x 3/4" Unions
1	3/4" x 4" Nipple
1	6" Ell
1	6" N. R. S. Gate
2	6" x 8" Nipples
1	6" Kew Union
1*	2" Mall Ell [97]

[Verified.]

Receipt of copy of the within petition for injunction is acknowledged this 25th day of March, 1946. Bodkin, Breslin & Luddy, Attorney for Defendant Samarkand Oil Company; Bodkin, Breslin & Luddy, Attorney for Defendant Treasure Company.

[Endorsed]: Filed Mar. 26, 1946. [98]

[Title of District Court and Cause]

NOTICE OF MOTION FOR INJUNCTION AND
RESTRAINING ORDER IN AID OF COM-
PLAINT IN CONDEMNATION

To the Defendants: Treasure Company, a corporation,
and to Bodkin, Breslin and Luddy, its attorneys;
Samarkand Oil Company, a corporation, and to Bod-
kin, Breslin and Luddy, its attorneys.

You, and Each of You will please take notice that on
the 8th day of April, 1946 at the hour of ten o'clock A. M.,
or as soon thereafter as counsel can be heard, the plaintiff
will move the above entitled Court in the courtroom of
the Honorable C. E. Beaumont in the Federal Building
at Los Angeles, California, for an injunction and re-
straining order restraining you, and each of you, from
proceeding further in each of those four certain actions
now pending in the Superior Court of the State of Cali-
fornia in and for the County of Los Angeles entitled re-
spectively: "Treasure Company, a corporation, vs. Union
Oil Company of California, a corporation," No. 505,967;
"Samarkand Oil Company, a corporation, vs. [99] Union
Oil Company of California, a corporation," No. 505,968;
"Treasure Company, a corporation, vs. Union Oil Com-
pany of California, a corporation," No. 507,385; "Sam-
arkand Oil Company, a corporation, vs. Union Oil Com-
pany of California, a corporation," No. 507,386, or from
doing or attempting to do any act in either or any of
said actions tending to fix or determine your rights, or the
rights of any of you, with respect to any of the property
described in either or any of said actions, or fixing or at-
tempting to fix the rights or liability of the United States

of America, Reconstruction Finance Corporation, a federal corporation, or any of its agencies or agents, or of the Union Oil Company of California, a corporation, in connection with, resulting from or growing out of the entry upon, the taking possession of, the continued possession of, or the condemnation of any of the property described in either or any of the aforesaid actions, save and except by such proceedings in the above entitled court as are provided for by its rules of practice or by the statutes in such case made and provided; and plaintiff will further move for such other and further or different relief in the premises as the nature of the case may require and as to the Court may seem *metc*, just and equitable.

Said motion will be made upon all of the files and records of the above entitled Court in the above entitled proceeding, and upon plaintiff's Petition verified the 11th day of February, 1946, and plaintiff's Points and Authorities, copies of which Petition and Points and Authorities are herewith annexed and served upon you.

Dated: This 11th day of February, 1946.

EUGENE D. WILLIAMS

Special Assistant to the Attorney General

JOSEPH F. McPHERSON

Special Assistant to the Attorney General

AUGUST WEYMANN

Special Attorney, Lands Division,
Department of Justice

By Eugene D. Williams

Attorneys for Plaintiff

Receipt of copy of the within Notice of Motion for Injunction and Restraining Order in Aid of Complaint in Condemnation is acknowledged this 25th day of March, 1946. Bodkin, Breslin & Luddy, Attorneys for Defendant Samarkand Oil Company; Bodkin, Breslin & Luddy, Attorneys for Defendant Treasure Company.

[Endorsed]: Filed May 26, 1946. [100]

[Title of District Court and Cause]

ANSWER OF TREASURE COMPANY, A CORPORATION,
AND SAMARKAND OIL COMPANY, A CORPORATION, TO PETITION FOR
INJUNCTION

Now come Treasure Company, a corporation, and Samarkand Oil Company, a corporation, and answering the Petition of plaintiff herein, for themselves and not for their co-defendants, admit, deny and allege as follows, to wit:

I.

Admit the allegations contained in Paragraph I of said Petition. Allege that such resolution, Exhibit "A", is the only resolution adopted by Reconstruction Finance Corporation prior to the institution of the present action and allege that by said resolution the directors of Reconstruction Finance Corporation did not determine the necessity of the taking or acquiring title to said real or [101] personal property described in said Petition, and Exhibits attached thereto, and insofar as the necessity of the taking of the real property is concerned said directors of Re-

construction Finance Corporation acted upon the resolution of Defense Plant Corporation, contrary to the authority granted to the directors of Reconstruction Finance Corporation, by Executive Order No. 9217, which specifically grants to Reconstruction Finance Corporation the discretion to determine whether it is necessary to take property by condemnation.

II.

Admit the allegations contained in Paragraph II of said petition. In this regard defendants allege that the resolution of September 18, 1942 authorized only the condemnation of real property. That the original complaint which is hereby by reference made a part hereof described only real property. That the order granting immediate possession, granted immediately upon filing the said action, which order is by reference hereby incorporated and made a part hereof, described only real property. That any designation of Union Oil Company of California to possess or care for personal property was void and of no force and effect, for the reason that no suit to condemn personal property was authorized or had been instituted and plaintiff was not entitled to take possession of such personal property at said time.

III.

Admit the allegations contained in Paragraph III of said petition. That the order of taking was made by Honorable C. E. Beaumont, Judge of the above-entitled Court, based upon said declaration of taking, which order of taking is hereby by reference incorporated herein and made a part hereof. That said declaration of taking and order of taking, described only real property, and [102] none of the personal property involved in the State actions,

sought to be restrained, was included in said declaration of taking or in said order of taking.

IV.

Deny the allegations contained in Paragraph IV of said petition, save and except that defendants admit that the Amendatory Resolution, a part of Exhibit "B" attached to said petition, was in fact adopted by Reconstruction Finance Corporation and that a letter, a copy of which is a part of said Exhibit "B" was in fact sent to the Attorney General; allege that said Amendatory Resolution was the only Resolution adopted authorizing the filing of said amended condemnation action or the taking of said personal property by condemnation.

Allege that on or about September 28, 1942, Union Oil Company of California, a corporation, without lawful authority and without right, took possession of the personal property described in Exhibit "B" attached to the petition, together with certain additional property belonging to these answering defendants; that at the time said Union Oil Company of California, a corporation, took possession of said personal property no resolution had been adopted by Reconstruction Finance Corporation authorizing the condemnation of said personal property nor the taking of possession of said personal property or any part thereof and that neither petitioner herein or Union Oil Company of California, a corporation, had any lawful right whatever to take possession of said personal property or any part thereof.

Allege that notwithstanding the demand of these answering defendants upon Union Oil Company of California, a corporation, demanding the return of said personal property, Union Oil Company of California, a

corporation, has at all times refused to return same or any part thereof to these answering defendants; that [103] plaintiff herein had no lawful right to take possession of or to manage or operate or control or to take into possession any part of said personal property and that if Defense Plant Corporation or petitioner did in fact attempt to authorize Union Oil Company of California, a corporation, to take possession of said personal property or any part thereof, they acted without authority and in excess of their lawful rights.

V.

Admit the allegations contained in Paragraph V of said petition. Allege that said amended complaint was the first and only complaint filed to condemn the personal property and that until said action was filed, petitioner had no lawful right to take, hold or detain any part of said personal property and any taking prior thereto by Union Oil Company of California or by petitioner was in fact unlawful. Allege that the inventory, Exhibit "C" attached to said petition, is a copy of the inventory attached to said Amendatory Resolution, Exhibit "B", and that said inventory at the time it was attached to said Exhibit "B", had the same headings which now appear in it, as to the property intended to be taken, to wit, "Union Oil Company of California Inventory of Materials and Supplies Taken Over by Defense Plant Corporation—September 29, 1942," and as to the property not deemed necessary to be taken, the same was listed under the following heading, "Items Deleted from Original Inventory as Indicated as Not Being Needed in Playa Del Rey Project."

VI.

Admit the allegations contained in Paragraph VI of said petition. That said answer of Samarkand Oil Company, a corporation, to said amended complaint is hereby, by reference, incorporated [104] herein and made a part hereof.

VII.

Admit the allegations contained in Paragraph VII of said petition. That said answer of Treasure Company, a corporation, to said amended complaint is hereby, by reference, incorporated herein and made a part hereof.

VIII.

Deny the allegations contained in Paragraph VIII of said petition, and in this regard allege that certain portions of said answers to plaintiff's amended complaint have been stricken on petitioner's motion and that said defendants have been granted permission to file amended defenses as to such portions of the answers stricken.

IX.

Admit that Samarkand Oil Company, a corporation, filed action number 505-968, in the Superior Court of the State of California, in and for the County of Los Angeles, for the recovery of a portion of said personal property described in said inventory, or for its value, and for damages for its withholding, but allege that as to a portion of said property described in said inventory, said Samarkand Oil Company, a corporation, has recovered judgment for its unlawful taking⁶ and withholding and that said judgment has been wholly satisfied. That petitioner Reconstruction Finance Corporation was a party to said action and was bound by said judgment. Allege that in

the above entitled action, if it is determined that said personal property has been lawfully taken, that defendant's sole recovery can be for the reasonable value of said personal property, at the time it was taken, on or after January 12, 1944, and that the above entitled Court cannot determine the issue as to whether said property was unlawfully taken by Union Oil Company of California, a corporation, [105] on September 28, 1942, the value of the property at said time or the damages suffered by reason of the unlawful withholding of said personal property by Union Oil Company of California, a corporation, thereafter. That the issue of whether Union Oil Company of California, a corporation, took said property is not involved in the above entitled action.

Deny that defendants knew that the possession, on September 28, 1942, was by way of condemnation, but allege it was unlawful and before any condemnation suit regarding said personal property had been authorized or filed.

X.

Admit that on September 27, 1945 defendant Treasure Company, a corporation, filed action number 505-967, in the Superior Court of the State of California, in and for the County of Los Angeles, for the recovery of the possession of a part of the personal property described in said inventory and for damages for its withholding, but allege that as to a portion of said property described in said inventory, said Treasure Company, a corporation, has recovered judgment for its unlawful taking and withholding and that said judgment has been wholly satisfied. That petitioner Reconstruction Finance Corporation was a party to said action and was bound by said judgment. Allege that in the above entitled action, if it is determined that

said personal property has been lawfully taken, that defendant's sole recovery can be for the reasonable value of said personal property, at the time it was taken, on or after January 12, 1944, and that the above entitled Court cannot determine the issue as to whether said property was unlawfully taken by Union Oil Company of California, a corporation, on September 28, 1942, the value of the property at said time or the damages suffered by reason of the unlawful withholding of said personal property by Union Oil Company of California, a corporation, [106] thereafter. That the issue of whether Union Oil Company of California, a corporation, took said property is not involved in the above entitled action.

Deny that defendants knew that the possession, on September 28, 1942, was by way of condemnation, but allege it was unlawful and before any condemnation suit regarding said property had been authorized or filed.

XI.

Admit that defendant Samarkand Oil Company, a corporation, filed action number 507-386, in the Superior Court of the State of California, in and for the County of Los Angeles, for wrongful production and removal of oil and gas. Allege in this regard that said defendant filed said action to prevent said cause of action becoming outlawed, in the event that the above entitled Court finds in its favor on the issues raised in the above entitled action. That said defendant has not set said case for trial and does not intend to set said case for trial, unless and until the above-entitled Court finds that the plaintiff is not entitled to condemn said real property described in the amended complaint.

XII.

Admit that defendant Treasure Company, a corporation, filed action number 507-385, in the Superior Court of the State of California, in and for the County of Los Angeles, for wrongful production and removal of oil and gas. Allege in this regard that said defendant filed said action to prevent said cause of action becoming outlawed, in the event that the above entitled Court finds in its favor on the issues raised in the above entitled action. That said defendant has not set said case for trial and does not [107] intend to set said case for trial, unless and until the above entitled Court finds that the plaintiff is not entitled to condemn said real property described in the amended complaint.

XIII.

Deny the allegations contained in Paragraph XIII of said petition, save and except that defendants admit that the personal property the subject matter of the actions described in Paragraphs IX, X, XI and XII, is a part of the property sought to be condemned by said amended complaint filed January 12, 1944, but which was unlawfully taken by Union Oil Company of California, on September 28, 1942.

XIV.

Deny the allegations contained in Paragraph XIV of said petition. Allege in this regard that Defense Plant Corporation, Reconstruction Finance Corporation, and petitioner, at all times claimed to be the real parties in interest, and that Union Oil Company of California, a corporation, was the agent of petitioner in taking possession of and retaining said property, and defendants well knew said contention, but in this regard allege that peti-

tioner had not sought to condemn said personal property at the time it was taken and retained, and that Union Oil Company of California illegally took possession of and retained said personal property, on September 28, 1942, and that defendants have a cause of action against Union Oil Company of California, a corporation, by reason thereof.

XV.

Deny the allegations contained in Paragraph XV of said petition and allege that when Union Oil Company of California, a corporation, claiming to be the agent of petitioner, took possession of said personal property, on September 28, 1942, neither petitioner [108] or said Union Oil Company of California, a corporation, had any lawful right to do so, and said act was in direct violation of the rights of defendants herein.

XVI.

Deny the allegations contained in Paragraph XVI of said petition.

XVII.

Deny the allegations contained in Paragraph XVII of said petition.

XVIII.

Deny the allegations contained in Paragraph XVIII of said petition and in particular allege that the act of Union Oil Company of California, a corporation, was in fact unlawful, in taking possession of and retaining said personal property, without lawful authority, and that the contract between Defense Plant Corporation and Union Oil Company of California, a corporation, does not re-

quire Defense Plant Corporation or Reconstruction Finance Corporation to save or hold harmless said Union Oil Company of California, a corporation, for its unlawful acts.

And for a First Separate Defense to Said Petition, These Defendants Allege as Follows, to wit:

I.

The first amended complaint was filed in the above entitled action, seeking to condemn the personal property pursuant to resolution of Reconstruction Finance Corporation, dated October 4, 1943, and the measure of damages for the taking is the value of [109] the property at the time that said personal property's condemnation was first sought, to wit, January 12, 1944. Allege further that under the statute described in plaintiff's petition, as well as in the Executive Order, Reconstruction Finance Corporation only has authority to condemn such personal property as is "located thereon or used therewith that shall be deemed necessary, for military, naval, or other war purposes," and it appears from Exhibit "B", particularly pages 103, 104, 109, 110, 111, 112 and 113 that the personal property described therein are "Items deleted from original inventory as indicated as not being needed in Playa Del Rey Project." That this Court is without jurisdiction to award damages against plaintiff in the present action for the taking of such property, which does not come within the purview of the statute, and that these answering defendants have a right to pursue the Superior Court actions for the purpose of recovering damages for the taking of such personal property admittedly unlawfully taken.

And for a Second Separate Defense to Said Petition, These Defendants Deny and Allege as Follows, to wit:

I.

Deny that the property described in said Superior Court actions is a portion of the property condemned in the above entitled action but allege in this regard that none of said personal property has been condemned and at the present time petitioner herein is seeking to condemn so much of said personal property as is "located thereon or used therewith that shall be deemed necessary, for military, naval, or other war purposes," and that said personal property was taken and possessed by Union Oil Company of California, a corporation, wrongfully and without lawful authority and its taking and possession by Union Oil Company of California is not the taking [110] and possession by United States of America, because there is no lawful authority for any petitioner herein to take any of said personal property prior to the filing of the first amended complaint herein, or at any time, for the taking or possession of any part of said personal property not "located thereon or used therewith that shall be deemed necessary, for military, naval, or other war purposes."

And for a Third Separate Defense to Said Petition, These Defendants Allege as Follows, to wit:

I.

That heretofore, to wit, on or about March 10, 1945, petitioner herein sought to enjoin the trial of actions then instituted and pending in the Superior Court of the State of California, in and for the County of Los Angeles, wherein defendants herein sought to recover in claim and delivery actions against Union Oil Company of California,

a corporation, for the unlawful taking of certain personal property, being oil well equipment situated at and on the leases described in the above entitled case; that said actions were numbered 489-318 and 489-319 in said court; that said motion was based upon the contention now made that the above entitled Court had sole and exclusive jurisdiction as to the personal property involved in said actions and in the actions now sought to be restrained and that the said Superior Court did not have jurisdiction to try or determine said actions. That defendants herein filed an answer to said Petition and motion for an injunction and said motion came on regularly for hearing before Honorable Paul J. McCormick, Judge of the above entitled Court, on or about the 26th day of March, 1945; that at said time said Court had jurisdiction of the parties thereto, being the same parties in the present proceeding, and the issues then presented were the same as [111] are now presented, to wit, did said Superior Court have jurisdiction to try the aforesaid actions for claim and delivery as to personal property and whether the above entitled Court had sole and exclusive jurisdiction to try said issues; that said issues were presented to the said Court and thereafter, on the 12th day of June, 1945, the above entitled Court, by decision of the Honorable Paul J. McCormick, decided each and all of said issues in favor of the defendants herein and against petitioner herein and then and there determined that said Superior Court did have jurisdiction to try said causes and that the above entitled Court did not have sole and exclusive jurisdiction to try the above entitled causes; that the aforesaid Notice of motion for injunction, the petition for injunction upon which said notice of motion was based, the answer to said petition and the aforesaid decision of the Honorable Paul

J. McCormick are hereby, by reference, incorporated herein, and hereby made a part hereof; that an appeal was taken from said decision but thereafter said appeal was dismissed and said decision is now final and conclusive and forever determines the fact that the Superior Court of the State of California, in and for the County of Los Angeles, does have jurisdiction to try such claim and delivery actions and that the above entitled Court does not have sole and exclusive jurisdiction thereof.

And for a Fourth Separate Defense to Said Petition, These Defendants Allege as Follows, to wit:

I.

That heretofore defendants herein instituted actions numbered 489-318 and 489-319, in said Superior Court, as plaintiffs, as against Union Oil Company of California, a corporation, as defendant, seeking to recover certain personal property described therein and for damages for withholding of same by Union Oil Company of California, [112] a corporation. That thereafter Defense Plant Corporation intervened in said actions on behalf of Union Oil Company of California, a corporation; that thereafter said causes of action were tried before the Honorable William J. Palmer, Judge of said Superior Court, and thereafter findings of fact and conclusions of law and judgment were rendered in said action in favor of defendants herein and against Union Oil Company of California, a corporation, holding substantially to the effect that Union Oil Company of California, a corporation, and Defense Plant Corporation had unlawfully taken possession of certain personal property, being a portion of the property described in Exhibit "C" attached to the Petition herein, and that defendants herein were entitled to damages therefor.

II.

That prior to the trial of said action Reconstruction Finance Corporation had succeeded to all of the rights of Defense Plant Corporation and subject to all of its liabilities, and said Reconstruction Finance Corporation was substituted as intervener in said action in the place and stead of Defense Plant Corporation prior to the rendition of said Judgment. That said judgment rendered in said action is binding and effective upon Reconstruction Finance Corporation, the real party in interest in the above entitled action.

III.

That the aforesaid judgment rendered by the Honorable William J. Palmer is final and conclusive, no appeal having been taken therefrom, and that said Judgment finally and conclusively determines that the taking of the personal property described in Exhibit "C" attached to the Petition herein was in fact unlawful and that Union Oil Company of California, a corporation, was liable for such unlawful taking. [113]

Wherefore these defendants pray that the injunction be denied and that defendants have such relief as is proper.

BODKIN, BRESLIN & LUDDY

By Henry G. Bodkin

Attorneys for Defendants Treasure Company,
a corporation, Samarkand Oil Company, a corp.

(Vertified by G. de Bretteville.)

Received copy of the within this 30 day of March,
1946. Lands Division, Dept. of Justice. A. W. Weymann,
by M. Koppenhaver, Attorney for

[Endorsed]: Filed Mar. 30, 1946. [114]

[RESPONDENT TREASURE CO. EXHIBIT A]

Bodkin, Breslin & Luddy
Attorneys at Law
1225 Citizens National Bank Bldg.
453 South Spring Street
Los Angeles 13, California
MUtual 3151
Attorneys for Plaintiff

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 489 318

Treasure Company, a corporation, Plaintiff, vs. Union Oil Company of California, a corporation, Defendant. Reconstruction Finance Corporation, a federal corporation, successor in interest to Defense Plant Corporation, a federal corporation, Complainant in Intervention.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

Said case came on regularly for trial in Department 29 of the above entitled court, the Honorable William J. Palmer, Judge presiding, and was consolidated for trial with case No. 489319 in said court entitled Samarkand Oil Company, a corporation, Plaintiff, vs. Union Oil Company of California, a corporation, Defendant, Reconstruction Finance Corporation, a Federal corpora- [115] tion, successor in interest to Defense Plant Corporation, a Federal corporation, Intervener, by stipulation of all of the parties to said cases.

Defense Plant Corporation, a Federal corporation, was prior to said 11th day of September, 1945 by order of this

court granted leave to intervene in said action and its complaint in intervention was filed herein. It appearing to the court that by act of Congress of the United States, Defense Plant Corporation, Intervenor herein, had been dissolved and that Reconstruction Finance Corporation had succeeded to all its assets and liabilities, upon stipulation of counsel for the respective parties, Reconstruction Finance Corporation was substituted as intervenor in the place and stead of Defense Plant Corporation.

Said cases duly came on for trial on the said 11th day of September, 1945 and were tried without a jury on the 11th, 12th, 13th, 19th, 20th, 21st, 24th, 25th, 26th and 27th days of September and on the 1st, 2nd, 3rd, 4th, 9th and 18th days of October, all in 1945, and on said last date was submitted to the court. Messrs. Henry G. Bodkin, and E. E. Hitchcock of the firm of Bodkin, Breslin & Luddy appeared on behalf of plaintiffs, and Messrs. Jacob J. Lieberman and Aaron Elmore of the firm of Benjamin, Lieberman and Elmore, and Messrs. J. F. McPherson and August Weyman, Deputy United States Attorney General, appeared in behalf of defendant and intervenor. Prior to the commencement of trial on September 11, 1945 the United States of America through its attorney, Eugene D. Williams, assistant to the Attorney General, appeared specially and solely and only for the purpose of suggesting and did suggest to this court that this court was without jurisdiction to proceed with an adjudication of these actions and that the United States of America, whom he stated was the real party in interest, did not consent to be made a party to this action and was not amenable to the jurisdiction of the above-entitled court. [116]

Motions to abate these actions and for a judgment in favor of the defendant and intervenor and for non-suit having been denied in each case and evidence both written and oral having been introduced and considered by the court, and said cases having been submitted to the court after arguments of counsel, and the court having been fully advised in the premises, the following findings of fact and conclusions of law constituting the decision of the court in said actions are hereby made.

FINDINGS OF FACT

I.

At all times mentioned in the complaint, the plaintiff Treasure Company, a corporation, was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of California.

II.

At all times mentioned in the complaint the defendant Union Oil Company of California, a corporation, was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of California.

III.

At all times mentioned in the complaint and until the 1st day of July, 1945 the complainant in intervention, Defense Plant Corporation, a federal corporation, was a federal corporation duly organized and existing under and by virtue of the laws of the United States of America.

IV.

On the 1st day of July, 1945, the said complainant in intervention, Defense Plant Corporation, a federal corporation, was dissolved by act of Congress and ceased to

exist, and thereupon Reconstruction Finance Corporation, a federal corporation, by said act of Congress became and was successor in interest to the said [117] Defense Plant Corporation, a federal corporation, and did assume all its obligations, and was by order of court, pursuant to stipulation, at the commencement of this trial, substituted as the party complainant in intervention in the place of the said Defense Plant Corporation, a federal corporation.

V.

At all times herein mentioned the said complainant in intervention, Reconstruction Finance Corporation, a federal corporation, was, and now is, a federal corporation, duly organized and existing under and by virtue of the laws of the United States of America.

VI.

On September 28, 1942 and for a long time prior thereto the plaintiff Treasure Company, a corporation, was the owner of, in possession of, and entitled to the immediate possession of, and after September 28, 1942 and until January 12, 1944 the said plaintiff was the owner of, and entitled to the immediate possession of, certain personal property hereinafter in these findings more particularly described and consisting of oil drilling tools and equipment not attached to real property and located upon Block 33 of Tract 9809 in the County of Los Angeles, State of California, as per map of said tract recorded in Book 145 of Maps at pages 91-96 inclusive in the office of the County Recorder of said County and State.

VII.

On the said 28th day of September, 1942 at and on said Block 33 of Tract 9809 in said County of Los Angeles, State of California, without the plaintiff's consent and

against its will, a Deputy United States Marshal, without any authorization from any source, without process of court related to said personal property and without direction from any agency of the United States Government falsely and wrongfully and willfully assumed dominion over the said personal property, and wrongfully and willfully took possession thereof and wrongfully delivered said personal property to the defendant, Union Oil Company of California, a corporation, which said [118] defendant on said date and at said place without right or authority wrongfully and willfully took possession of said personal property and thereafter continuously and until January 12, 1944 wrongfully and willfully held possession thereof and detained the same and wrongfully prevented the plaintiff Treasure Company, a corporation, from taking possession thereof.

VIII.

Between the 28th day of September, 1942 and the 12th day of January, 1944 the plaintiff Treasure Company, a corporation, on several occasions and particularly on September 30, 1942 and during the month of October and November of 1942 and during the month of April, 1943, demanded the return of said personal property but at all times the said defendant Union Oil Company of California, a corporation, wrongfully refused and continued wrongfully to refuse to deliver possession of said personal property to the said plaintiff until January 12, 1944.

c IX.

On said 28th day of September, 1945 the fair reasonable market value of said personal property was the sum of \$4,496.15.

X.

By order of court during the trial of this action the complaint herein of the Treasure Company, a corporation, in Action No. 489318 was amended so that each item therein described was given an item number. The item numbers and descriptions of each of said items of personal property taken and detained by said Deputy United States Marshal and by the said Union Oil Company of California, a corporation, as aforesaid, together with the fair reasonable market value of each item as of September 28, 1942 are as follows, to-wit: [119]

Item	Value
1. One galvanized corrugated 9'x9' steel tank	\$ 110.00
2. One complete steel standard end with 12 foot band wheel	1,650.00
3. 6639.25 feet of 6.5 lb. seamless external upset steel tubing	2,343.65
4. 7560 feet of $\frac{3}{4}$ " and $\frac{7}{8}$ " steel sucker rods with couplings	192.50
5. One furnished peaked roof corrugated iron portable office building, mounted on 2 18 ft. 8 in. x 8 in. pine timbers skids	200.00
Total	\$4,496.16

XI.

The reasonable rental value of the said personal property hereinabove described from September 28, 1942 to January 12, 1944 was \$1,700.00.

With Respect to the Answer of the Defendant Union Oil Company of California, a Corporation, Except Inso-

far as the Above Findings May Apply Thereto the Court Finds as Follows

XII.

With respect to the second separate and distinct defense of said answer, the court finds that it is not true that on or about September 29, 1942, or at any time prior to January 12, 1944, the United States of America, for the use of Reconstruction Finance Corporation, a federal corporation, acting in behalf of Defense Plant Corporation, a federal corporation, or otherwise appropriated or took possession of the personal property hereinabove described, or any part thereof, under claim of eminent domain for use in connection with the establishment of a reservoir for the injection, storage, conservation or withdrawal of natural gas or incidental purposes or for use in the operation of oil or gas wells or in the treating, storing or disposing of the products thereof, or that it [120] thereupon delivered said personal property or any part thereof to the defendant Union Oil Company of California, a corporation, for such uses or purposes or any of them on behalf of the Defense Plant Corporation, a federal corporation. It is not true that the said United States of America ever took possession of said personal property or any part thereof or enjoyed any lawful right to the possession of all or any part thereof, until January 12, 1944.

XIII.

With respect to Paragraph II of said second separate and distinct defense the court finds that no lawful appropriation of personal property was made at the request of the assistant secretary of the Reconstruction Finance Corporation, an agency of the United States or under

direction of the Attorney General of the United States, or otherwise on September 28, 1942 or at any time prior to January 12, 1944. The court further finds with respect to said Paragraph II that it is not true that the defendant Union Oil Company of California, a corporation, in its acceptance, retention or use of said personal property or any part thereof, prior to January 12, 1944 was at all times, or at any time, acting on behalf of the United States of America for the use of Reconstruction Finance Corporation, a federal corporation, acting in behalf of Defense Plant Corporation, a federal corporation.

XIV.

With respect to the third separate and distinct defense contained in the said answer of the defendant Union Oil Company of California, a corporation, the court finds that it was not true that at any time prior to January 12, 1944 there was pending in the United States District Court, Southern District of California Central Division, an action in condemnation numbered 2454-B Civil in which the said personal property hereinabove described or any part thereof was sought to be appropriated or condemned by the United States of America for the use of Reconstruction Finance [121] Corporation, a federal corporation, acting in behalf of Defense Plant Corporation, a federal corporation, or that the plaintiff herein, Treasure Company, a corporation, was in any such action prior to January 12, 1944 offered or tendered reasonable or any compensation for the taking or detention of said personal property or any part thereof, or that any such compensation was offered or tendered to the person or persons or concerns or corporations lawfully entitled thereto.

XV.

With respect to the said third separate and distinct defense contained in the answer of the defendant Union Oil Company of California, a corporation, the court finds that Action No. 2454-B Civil was commenced September 28, 1942, in the United States District Court, Southern District of California, Central Division, and said action is now, and at all times since September 28, 1942 has been, pending in said court. Said action when filed did not relate to, and at no time until January 12, 1944 did it relate to the personal property hereinabove described, or any part thereof. Said action was on September 28, 1942 and at all times until January 12, 1944, an action in condemnation of real property only, including, amongst other parcels of land, said Block 33, Tract 9809 in the County of Los Angeles, State of California, as per map of said tract recorded in Book 145 of Maps at pages 91-96 inclusive, Records of said County. Said action was brought by the United States of America, for the use of Reconstruction Finance Corporation, a federal corporation, acting in behalf of Defense Plant Corporation, a federal corporation, and the public use for which said real property was sought to be taken was the establishment of a reservoir for the storing and conservation of natural gas.

Neither the United States of America, the said Reconstruction Finance Corporation, a federal corporation, nor Defense Plant Corporation, a federal corporation, at any time prior to October 4, 1943, intended to take said personal property, or any part thereof, in or by reason of said condemnation action, nor did they, or any of them, institute any action to condemn all or any of said personal property until January 12, 1944. [122]

With Respect to the Complaint in Intervention of Defense Plant Corporation, A Federal Corporation, Except as the Above Findings May Apply Thereto, the Court Finds as Follows:

XVI.

With respect to the separate second and distinct defense contained in said complaint in intervention, the court finds that at no time prior to January 12, 1944 was there an action in condemnation pending in the United States District Court, Southern District of California, Central Division, numbered 2454-B Civil in which the personal property hereinabove described, or any part thereof was sought to be appropriated or condemned by the United States of America for use of the Reconstruction Finance Corporation, a federal corporation, acting in behalf of Defense Plant Corporation, a federal corporation, or otherwise.

That it is not true that Treasure Company was offered or tendered reasonable or any compensation for the taking or detention of the said personal property or any part thereof, nor was any such compensation offered or tendered to the person or persons or concerns or corporations lawfully entitled thereto.

XVII.

With respect to said third separate and distinct defense contained in said complaint in intervention, the court finds that Action No. 2454-B Civil was commenced September 28, 1942, in the United States District Court, Southern District of California, Central Division, and said action is now, and at all times since September 28, 1942 has been, pending in said court. Said action when filed did not relate to, and at no time until January 12, 1944; did

it relate to the personal property hereinabove described, or any part thereof. Said action was on September 28, 1942, and at all times until January 12, 1944, an action in condemnation of real property only, including, amongst other parcels of land, said Block 33, Tract 9809 in the County of Los Angeles, State of California, as per map of said tract recorded in Book 145 of Maps [123] at pages 91-96 inclusive, Records of said County. Said action was brought by the United States of America, for the use of Reconstruction Finance Corporation, a federal corporation, and the public use for which said real property was sought to be taken was the establishment of a reservoir for the storing and conservation of natural gas.

Neither the United States of America, the said Reconstruction Finance Corporation, a federal corporation, or Defense Plant Corporation, a federal corporation, at any time prior to October 4, 1943 intended to take said personal property, or any part thereof, in or by reason of said condemnation action, nor did they, or any of them, institute any action to condemn all or any of said personal property until January 12, 1944.

XVIII.

With respect to the third separate and distinct defense contained in the said complaint in intervention the court finds that prior to September 28, 1942, and at all times since, the Reconstruction Finance Corporation was authorized by Act of Congress (Title 15 U. S. C. A., Section 606b), in order to aid the government of the United States in its National Defense Program to create or organize a corporation, or corporations, "with power (a) to produce, acquire, carry, sell, or otherwise deal in strategic and critical materials as defined by the President; (b)

to purchase and lease land, purchase, lease, build and expand plants, and purchase and produce equipment, facilities, machinery, materials, and supplies for the manufacture of strategic and critical materials, arms, ammunition, and implements of war, any other articles, equipment, facilities, and supplies necessary to the national defense, and such other articles, equipment, facilities and supplies necessary to the national defense and such other articles equipment, supplies, and materials as may be required in the manufacture or use of any of the foregoing or otherwise necessary in connection therewith; (c) to lease, sell, or otherwise dispose of such land, plants, facilities, and machinery to others to engage in such manufacture; [124] (d) to engage in such manufacture itself, if the President finds that it is necessary for a Government agency to engage in such manufacture itself." Defense Plant Corporation has been created by Reconstruction Finance Corporation for said purposes, among others.

XIX.

With respect to Paragraph III of the said third separate and distinct defense in said complaint in intervention, the court finds that it is not true that on or about September 29, 1942 or at any time prior to January 12, 1944, the United States of America for the use of Reconstruction Finance Corporation, a federal corporation, acting in behalf of Defense Plant Corporation, a federal corporation, or otherwise, appropriated or took the above described personal property or any part thereof under claim of eminent domain for the national defense or for use in the establishment of a reservoir for the injection, storage, conservation or withdrawal of natural gas or incidental purposes or for use in the operation of oil or gas wells or in the treating, storing or disposing of the

products thereof or otherwise or that it thereupon lawfully delivered said personal property or any part thereof to the defendant Union Oil Company of California, a corporation, for such uses or purposes or any of them, on behalf of the Defense Plant Corporation, a federal corporation, or otherwise.

XX.

With respect to Paragraph IV in said third, separate and distinct defense contained in said complaint in intervention, the court finds that there was no lawful appropriation of said personal property or any part thereof made at the request of the assistant secretary of the Reconstruction Finance Corporation, an agency of the United States of America or under the direction of the Attorney General of the United States, on September 29, 1942 or at any time prior to January 12, 1944. [125]

XXI.

The court finds that at the time of the commencement of this action, and thereafter until and at all times after January 12, 1944, it was impossible for the defendant Union Oil Company of California, a corporation, to deliver said personal property of the plaintiff Treasure Company, a corporation, or any portion thereof to the said Treasure Company, a corporation in substantially the same condition as it was in when first taken and received by the defendant Union Oil Company of California, a corporation, as aforesaid.

On January 12, 1944 an amended complaint was filed by the United States of America in said action No. 2454-B Civil in the United States District Court, Southern District of California, Central Division, wherein the said United States of America sought to condemn said personal property for the Reconstruction Finance Corporation, a federal corporation, acting in behalf of Defense Plant Corporation, a federal corporation, and thereupon claimed possession of said personal property by virtue of said condemnation.

XXII.

The court finds that all allegations contained in the answer of the defendant Union Oil Company of California, a corporation, and in the said complaint in intervention of the Reconstruction Finance Corporation, a federal corporation, as successor in interest to the Defense Plant Corporation, a federal corporation, with respect to which specific findings are not made, are untrue. [126]

CONCLUSIONS OF LAW

I.

By reason of the facts hereinabove found relative to the filing on January 12, 1944 of an amended complaint in the condemnation action No. 2454-B Civil, in the United States District Court, Southern District of California, Central Division, it has been legally impossible since January 12, 1944 for the defendant Union Oil Company of California, a corporation, to deliver back to the plaintiff herein the personal property hereinabove de-

scribed, even if the same existed in substantially the same condition as when taken by said defendant and were still in its possession.

II.

The plaintiff Treasure Company, a corporation, is entitled to have and recover of and from the defendant Union Oil Company of California, a corporation:

1. The sum of \$4,496.15 as the reasonable market value of said personal property together with interest thereon from the 12th day of January, 1944 at the rate of 7% per annum, until date of judgment.

2. The sum of \$1,700.00 as the reasonable rental value of said personal property from September 28, 1942 to January 12, 1944.

3. The plaintiff's costs of suit incurred or expended herein.

Let judgment be entered accordingly.

Dated: This 5th day of December, 1945.

~~William J. Palmer~~

W. J. Palmer, Judge of said Court [127]

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MUtual 3151
Attorneys for Plaintiff

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 489 318

Treasure Company, a corporation, Plaintiff, vs. Union Oil Company of California, a corporation, Defendant. Reconstruction Finance Corporation, a Federal corporation, successor in interest to Defense Plant Corporation, a Federal corporation, Complainant in Intervention.

JUDGMENT

This cause came on regularly for trial in Department 29 of the above entitled court before the Honorable William J. Palmer, Judge presiding therein, without a jury on the 11th day of September, 1945 and was tried on the 11th, 12th, 13th, 19th, 20th, 21st, 24th, 25th, 26th and 27th days of September and on the 1st, 2nd, 3rd, 4th, 9th and 18th days of October, all in 1945, together with a case entitled "Samarkand Oil Company, a corporation, Plaintiff, vs. Union Oil Company of California, a corporation, defendant," number 489319, in the files of said court, said cases having been consolidated for trial by stipulation. Messrs. Henry G. Bodkin and E. E. Hitchcock of the firm of Bodkin, Breslin & Luddy appeared [128] at said trial on behalf of the plaintiff Treasure Company, a corporation, and Messrs. Jacob J. Lieberman and Aaron Elmore of the firm of Benjamin, Lieberman and Elmore.

and Messrs. J. F. McPherson and August Weyman, Deputy United States Attorney General, appeared at said trial on behalf of the defendant Union Oil Company of California, a corporation, and the complainant in intervention, Reconstruction Finance Corporation, a federal corporation, as successor in interest to Defense Plant Corporation, a federal corporation. Evidence both oral and documentary was introduced by the respective parties and after argument of counsel for said parties the case was submitted to the court on October 18, 1945 and the court being fully advised in the premises and having filed herein its findings of fact and conclusions of law, and having directed that judgment be entered accordingly, now, therefore, by reason of the law and findings as aforesaid,

It is Hereby Ordered, Adjudged and Decreed:

That the plaintiff Treasure Company, a corporation, have and recover of and from the defendant Union Oil Company of California, a corporation:

1. The sum of \$6,196.15, together with interest on the sum of \$4,496.15 from the 12th day of January, 1944 until the date of this judgment at the rate of 7% per annum, said interest being in the sum of \$595.08;
2. Plaintiff's costs of suit expended herein, and herein taxed at \$138.50.

Dated this 5 day of December, 1945.

Wm. J. Palmer

WILLIAM J. PALMER

Judge of said Court.

Case No. 2454-B-Civ. U. S. vs. Land. Respt. Treasure Co. Exhibit No. A in Evidence. Date 6-10-46. Clerk, U. S. District Court, Sou. Dist. of Calif. R. B. Clifton, Deputy Clerk. [129]

[Title of District Court and Cause]

STIPULATION RE RECORD ON APPEAL
AND ORDER

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, that the Notice of Ruling of Judge William J. Palmer in Los Angeles Superior Court actions No. 489318 and No. 489319 entitled "Treasure Company, a corporation, Plaintiff, vs. Union Oil Company of California, a corporation, Defendant, et al.," and "Samarkand Oil Company, Plaintiff, vs. Union Oil Company of California, a corporation, Defendant," respectively, dated February 20, 1945, and the Notice of Decision of the said Judge William J. Palmer dated October 23, 1945, in Los Angeles Superior Court cases numbered 489318 and 489319 and entitled as above stated are the Notice of Ruling and the Notice of Decision which [130] were presented to and considered by Judge Campbell E. Beaumont in the instant case, "United States of America, et al., Plaintiff, vs. Certain Parcels of Land in the City of Los Angeles, et al., Defendants," No. 2454-B Civil, in the proceedings before said Judge in this case on June 10 and June 11, 1946, upon the application for the injunction, the Order granting which is here appealed from.

It Is Further Stipulated that said Notice of Ruling and Notice of Decision may be certified as a part of the record on appeal in this action by the Clerk in this appeal

by defendants Treasure Company, a corporation, and Samarkand Oil Company, a corporation, from that certain Order of the District Court of the United States in and for the Southern District of California, Central Division, made and entered into on the 4th day of August, 1947, as requested by the said defendants in their Designation of Record, as items 15 and 16 thereof, and said Designation of Record having been heretofore filed herein on August 18, 1947.

Dated: September 23rd, 1947.

JAMES M. CARTER

United States Attorney

JOSEPH F. McPHERSON

Special Assistant to the Attorney General

AUGUST WEYMANN

Special Attorney, Lands Division,
Department of Justice

By A. Weymann

Attorneys for Plaintiff, United States of
America

Defendants, TREASURE COM-
PANY, LTD., a corporation,
and SAMARKAND OIL COM-
a corporation,

By Bodkin, Breslin & Luddy

By E. E. Hitchcock

Attorneys for Said Defendants. [131]

ORDER

Pursuant to the foregoing Stipulation between the above named parties in the above entitled action, and good cause appearing therefor,

It Is Hereby Ordered that the said Notice of Ruling of Judge William J. Palmer in Los Angeles Superior Court actions No. 489318 and 489319 entitled "Treasure Company, a corporation, Plaintiff, vs. Union Oil Company of California, a corporation, Defendant, et al.," and "Samarkand Oil Company, Plaintiff, vs. Union Oil Company of California, a corporation, Defendant," respectively, dated February 20, 1945, and the Notice of Decision of the said Judge William J. Palmer dated October 23, 1945, in Los Angeles Superior Court cases numbered 489318 and 489319 and entitled as above stated are the Notice of Ruling and the Notice of Decision, which were presented to and considered by Judge Campbell E. Beaumont in the instant case, "United States of America, et al., Plaintiff, vs. Certain Parcels of Land in the City of Los Angeles, et al., Defendants," No. 2454-B Civil, in the proceedings before said Judge in this case on June 10, and June 11, 1946, upon the application for the injunction, the Order granting which is here appealed from; and

It Is Further Ordered That said Notice of Ruling and Notice of Decision shall be certified as a part of the record on appeal in this action by the Clerk, in this appeal by defendants Treasure Company, a corporation, and Samarkand Oil Company, a corporation, from that certain Order of the District Court of the United States in and for the Southern District of California, Central Division, made and entered into on the 4th day of August,

1947, as requested by the said defendants in their Designation of Record, as items 15 and 16 thereof, and said Designation of Record having been heretofore filed herein on August 18, 1947.

Dated: September 24, 1947.

C. E. BEAUMONT

Judge [132]

In the Superior Court of the State of California
in and for the County of Los Angeles

Treasure Company, a corporation, Plaintiff, vs. Union Oil Company of California, a corporation, Defendant.
No. 489318.

Samarkand Oil Company, a corporation, Plaintiff vs. Union Oil Company of California, a corporation, Defendant. Defense Plant Corporation, a Federal Corporation, Complainant in Intervention. No. 489319.

NOTICE OF RULING

To Counsel:

This rather informal memorandum to counsel will be written as if it applied to only one case, but counsel will understand that it applies to each of the two cases, the respective titles of which are above set forth.

Two motions are before the court, made pursuant to the [133] notice of motion, bearing date February 1, 1945 and filed February 5, 1945. Without stating the motions in the language of the notice, I shall comment that one of them is equivalent to a plea in bar, the granting of which would result in a dismissal of the action.

The other may more aptly be called a plea in abatement, the granting of which would result only in an indefinite postponement of the trial.

In considering the two motions, one must guard against three possible pitfalls that might prevent a true analysis and a sound conclusion. The first is the invitation to decide the case on its merits, from the evidence presented in affidavits and admitted, and under the law as the court might hold it to be after a thorough consideration of the extensive briefs filed by counsel.

I believe that I have successfully guarded against this first pitfall. I have been particularly eager to do so in view of the possibility that if the motions are denied the case may be tried before me.

The second temptation to deviate from a true course of thinking is the inclination to hurriedly yield exclusive jurisdiction to the Federal courts because certain Federal laws and the conduct of certain Federal officers are involved. In addressing the eminent counsel in this case, I need not elaborate on the comment just made.

The third opportunity for going astray lies in the commonly accepted idea that the propriety of a plea in bar or in abatement is determined by the identity of the issues in the two actions involved. At this point I would emphasize the incompleteness of that thought. Two actions might involve similar or identical issues of fact and law, and yet, because the remedy sought in one is entirely different from the remedy sought in the other, the trial of both actions might be necessary.

Among the several rules that have been laid down for the [134] testing of pleas in bar and in abatement, the one which goes directly to the heart of the matter, which

is not "technical", as that term is commonly understood, but which vitally affects the administration of justice as between the parties involved, is the principle which underlies, as the *raison d'être*, the whole practice of abatement, and which provides that a prior action will bar a later when the same relief is sought in both, when the former will afford an ample remedy so that a final judgment in it would constitute a bar to the second. Manifestly, when such a state of facts exists, the second action is unnecessary and vexatious.

Bolton v. Landers, 27 Cal. 104

Security Trust & Sav. Bank v. Claussen, 44 Cal. App. 730

Dyer v. Scalmanini, 69 Cal. 637

Fresno Planing Mill Co. v. Manning, 20 Cal. App. 766

Baker v. Eilers Music Co., 175 Cal. 652

McCormick v. Gross, 135 Cal. 302

Hall v. Susskind, 109 Cal. 203

Martin v. Splivalo, 69 Cal. 611

Vance v. Olinger, 27 Cal. 358

Cyclopedia of Federal Procedure, 2nd Edition, vol. 7, p. 342, note 13

Harrison v. Wash. Loan & Tr. Co., 258 Fed. 273

Chicago B. & Q. R. Co. v. Weil, 183 Fed. 956

Watson v. Jones, 80 U. S. 679

Tebbe v. Union Realty Corp., 286 Fed. 1011

N. Y. Cotton Exchange v. Hunt, 144 Fed. 511, 205 U. S. 322; 51 L.^c Ed. 821.

It may fairly be said, I think, that all the other rules applying to pleas in abatement, were designed to make certain that the one basic principle stated in the forego-

ing paragraph was properly invoked. In passing we may note that such pleas are not [135] favored and are strictly construed.

1 Cal. Jur. 81, sec. 50 and notes 16 and 17.

Let us direct our attention to the basic question, and consider the possibilities involved.

At this point we must confine ourselves to considering possibilities, for were we to attempt to determine probabilities, we would be undertaking to decide the merits of the controversy.

If the Federal court, in action No. 2454-B Civil, should hold that possession of the personal property never was lawfully taken from the plaintiff, no judgment in condemnation would ensue, and plaintiff would leave the Federal court with no compensation whatsoever for the damage claimed to have been suffered from the acts of Federal officials thus held to have acted unlawfully.

If the Federal court, in action No. 2454-B Civil, should hold that possession of the personal property was not lawful prior to the filing of the pleading titled a "First Amended Complaint," but became lawful at that time, the court would be powerless in that action to do anything about the unlawful possession previous to that date. Although in condemnation a property owner is supposed to receive full compensation for the property taken and for the damages suffered from the taking, the damages thus embraced are only those that flow from the lawful taking. They do not include injury suffered from prior unauthorized and unlawful acts of public officials. Hence,

in the event of the possibility here being considered, the Federal court could not give plaintiff any relief for an element of damage claimed to have been suffered and claimed to be substantial.

If the Federal court should decide that the taking of the personal property was lawful in the first instance and that thereafter the holding of possession against the plaintiff has been lawful, and if such a decision should follow a judgment of this court against the plaintiff, plaintiff would stand before the [136] Federal court as the one to be compensated for the taking of the property. No difficulty or entanglement of status would result from the two trials.

If prior to such a judgment of the Federal court, this court were to deliver a judgment in plaintiff's favor against the Union Oil Company of California, such judgment of this court would be founded on one of two theories: 1. That the taking of possession by Federal officials was unlawful and the holding of possession since has been unlawful. In such a case, the judgment of this court, except for the element of damages, would be in the alternative. If the defendant should pay the adjudicated value of the property rather than return it, or if judgment for such value should be satisfied by execution, the title to the property would pass to defendant. The Union Oil Company of California then would stand before the Federal court as the party to be compensated for the property. No entanglement of status would obstruct the orderly proceedings of that court. As there is no likeli-

hood of defendant returning the property to the plaintiff so long as the Federal action pends, we need not spend time on that possibility.

2. If this court should hold that the taking of the property was unlawful in the first instance, but became lawful when the "First Amended Complaint" was filed in the Federal action, it might pursue either of two courses, depending on how it viewed the law. 1. It might regard the present factual status as a complete defense to replevin, and award only damages suffered by plaintiff from the date of the taking to the date of the filing of the amended pleading. In that case, plaintiff would stand before the Federal court as the one to be compensated for the property, and no entanglement of status would obstruct the orderly proceedings of that court. 2. It might find against the defendant, concluding that if defendant had not retained the personal property, that property would not have remained on the land, and no occasion [137] for filing the amended pleading would have existed. So viewing the matter, the court might hold that the defendant had converted the property, and as defendant would not be able to redeliver, an alternative judgment would be useless. This court then would give plaintiff judgment for damages and for the value of the property. The title to the property would be vested in defendant; and defendant then would stand before the Federal court as the one to be compensated. No entanglement of status would obstruct the orderly proceedings of that court.

For the reasons that I have indicated, I hold that the duty of this court is to try the action and that a serious injustice might be done to plaintiff to deny to it the day in court to which it appears to be entitled. I do not consider it necessary to deal with certain other, and perhaps more "technical", rules, which also may be obstacles to the pleas in bar and abatement.

In connection with the foregoing, we should have in mind the significance of the fact that plaintiff's cause of action, regardless of the legal questions or evidential issues of fact that may become involved, or their complications, is a simple cause of action in replevin, commonly called "claim and delivery", and is not prosecuted for the purpose of recovering compensation from anyone or any government or institution in return for a lawful taking of property. The case is based on alleged ownership and right of possession, and the mere fact that another case of an entirely different nature, premised on an entirely different theory, prosecuted for an entirely different purpose, involves certain identical questions of law and fact, does not bar plaintiff's pursuit of a remedy, which, if its allegations are true, can be obtained only in this action.

The motions hereinabove referred to are denied.

Done this 20th day of February, 1945.

c William J. Palmer

Judge

[Endorsed]: Filed Feb. 20, 1945. [138]

In the Superior Court of the State of California
in and for the County of Los Angeles

Treasure Company, a corporation, Plaintiff, vs. Union
Oil Company of California, a corporation, Defendant.
No. 489318.

Samarkand Oil Company, a corporation, Plaintiff, vs.
Union Oil Company of California, a corporation, De-
fendant. No. 489319.

NOTICE OF DECISION

To Counsel:

The unique final "argument" of Attorney J. F. McPherson for the defendant suggests that certain points made by the court, when announcing from the bench its ruling on the question of liability, ought to be stated again, or clarified; or, if perchance the court only hinted and failed to state a conclusion involved in the progression of thought leading to its decision, to state such conclusion at this time as precisely as possible, all to the end that counsel may be guided in the preparation of [139] findings, conclusion and judgment. (In referring to the uniqueness of the final statement of distinguished and brilliant counsel, I did not intend reference to his warning that an appeal from the trial court's decision would be prosecuted. Every now and then, for some reason that I never have been able to understand, a lawyer reminds the trial judge that an appeal is in the offing, although many of the ablest lawyers assume that the trial judge knows of the right and possibility of appeal and refrain from any "argument" based on an assumption to the contrary.)

This court has not found that the United States government, or any agency of it, seized the property involved in this case on or about September 28, 1942. The court does find that an individual who held the office of United States Marshal, without any authorization from any source, without process of court related to the property in question, without direction from any agency of the government, falsely assumed dominion over the property and falsely assumed authority to deliver it into the custody of the defendant, which, equally without right or authority, thereupon asserted and took dominion over the property and thereafter held possession thereof against the demands of plaintiffs for its return.

This court has not held of its own opinion that any agency of the government ever came into lawful possession of the property in question, but the court has presumed, for the purposes of this trial, that in permitting the filing of a late amendment to a condemnation action pertaining to real estate, by which amendment the action was made to embrace the personal property involved in this case, the United States District Court acted properly and in accordance with law. Invoking that presumption leads to the conclusion that the property was condemned as of the date of the filing of the amendment and that thereupon the United States Government, through the Defense Plant Corporation, in exercise of the [140] right of eminent domain came into lawful possession of the property.

It would be inaccurate to leave the impression that this judge is of the personal opinion that the commencement of condemnation proceedings against the personal property involved in this case, by way of such amend-

ment filed in January, 1944, when the actions in this Superior Court were threatened and were about to be commenced, was in good faith or was founded on any need by the Government for the property or on any intention to put it to the public use. This court merely applies the presumption of good faith and regularity to the proceedings of the federal agencies involved.

This court has not found that the action of the person who first asserted unlawful dominion over the property in September of 1942 and assumed authority to deliver it over to the defendant was thereafter ratified by any agency of the United States Government. To the contrary, this court is of the opinion that no agency of the United States Government had authority to ratify such an act and the court holds that no such agency ever did ratify it. The court finds also that the unlawful action of the defendant in detaining the property from the plaintiffs never has been ratified by any agency of the United States Government, and the court is of the opinion that no such agency has had authority to ratify such conduct.

Concerning the Expert Testimony

Considering now the question of damages, this being quite an informal statement, let me shift to the first person. I stated from the bench that I believed in the sincerity of all the expert witnesses and regarded the conflict among them as being a clash in points of view rather than in motive. I still am of that opinion as to the matter of motive and integrity, but I must elaborate and say that the conflict arises from more than difference in points of view. The personal experiences upon which each witness [141] has relied, his memory, his

ability or lack of ability to visualize conditions as of September, 1942, his imagination, and the effect upon his mind of seeing the property after months of neglect—these factors, I am sure, have played a part in giving us many wide disagreements. Even among defendant's witnesses these disagreements have been marked. This fact is a token of their independent, individual approach and of their sincerity, but is very convincing evidence of either or both of two possible conditions: (1) that there existed an extremely wide margin, within which market value fluctuated; (2) that each of the defendant's experts testified more from his own limited personal experience than from a broad knowledge of general market conditions and prices.

Among defendant's witnesses we have variations ranging in ratios up to 30 to one, a difference of 2900 per cent. We have a disagreement that reaches from no value to \$150. We have many differences in lower ratios: three to one, four to one, five to one, ten to one, fifteen to one, twenty to one. These wide variations take much from the positiveness of the testimony of defense experts.

The most significant conflict in the testimony of values is that between the testimony of Mr. De Bretteville and Mr. Summers, on the one hand, and the testimony of Mr. O'Brien on the other as to new values, cost or replacement values. Ordinarily we should expect testimony as to cost prices to show little disagreement. If two witnesses, each for a different side, were well prepared on that subject before coming to court, each having had access to catalogs and reliable sources of information to confirm his estimates, no general, substantial

conflict ought to exist between their testimony. But between the testimony of the plaintiffs' witnesses and that of Mr. O'Brien for the defendant wide disagreement exists throughout the entire inventory as to original cost [142] prices, the variation running from two to one to ten to one in one instance, with many instances where the ratio is of four or more to one. I liked Mr. O'Brien and regarded him as a man of ability and of integrity. But he came to court not expecting to be called upon to give the cost prices of new items and he gave his testimony as to such prices from memory and on the spur of the moment. I am satisfied that he was in error and that the evidence presented by the plaintiffs as to cost prices was dependable throughout, the result of a careful and efficient investigation to obtain from reliable sources the cost of sales prices of new materials and equipment. The conflict as to these prices gives further evidence of the frailty of memory and of how human and limited all of us are. The ideas of new values as of September, 1942 exhibited by the witness reflects significantly on his ideas of second-hand values.

Another bit of testimony that throws light on our problem was that of defendant's witness Mr. Webb as to the cost of putting certain of the equipment into good condition for renting. It is possible, of course, for the repair of an item of machinery to cost more than the machinery is worth; but ordinarily a reasonable relationship exists between the cost of repair and the value. Mr. Webb's own testimony, considered most favorably to the

defendant, as to what the rental value of the equipment would be after the proposed repairs were made, shows that the estimated cost of the repairs bore a reasonable and normal relationship to the value of the equipment—a value far out of line with that attached to it by defendant's experts.

As my findings to be shortly announced will show, I do not go all the way with plaintiffs' witnesses as to the fair market value of the property, but I do accept as reliable their testimony as to replacement costs and I do not question the sincerity of [143] their testimony as to the condition of the property when possession was taken by the defendant. It will be noted, and I may as well frankly state, that I am placing a good deal of faith in the O.P.A., although I do not hold that an O.P.A. ceiling is necessarily fair market value, and in this instance I give importance to the ceiling not as an isolated fact but in connection with and in the light of all other evidence. A technician might even question the admissibility of evidence of O.P.A. ceilings, and could support his doubt by a strong argument, for a governmental, war-measure restriction upon sales price does not give an answer to the question: what would a willing buyer, not compelled to buy, be willing to pay?

Samarkand

I find the fair market values of the items of property involved in the Samarkand case, each considered separately, as of September 28, 1942, to be as follows:

Tank	\$ 550.00	31	50.00
1	16,664.08	32	644.60
2	1,914.00	33	200.00
3	4,767.40	34	825.00
4	7,706.05	35	82.50
5	1,000.00	36	74.25
6	550.00	37	99.00
7	880.00	38	46.75
8	586.30	39	77.00
9	494.45	40	165.00
10	1,222.66	41	74.25
11	615.92	42	125.00
12	500.00	43	100.00
13	328.00	44	300.00
14	247.50	45	66.00
15	68.75	46	66.00
16	74.25	47	82.50
17	42.00	48	280.50
18	200.00	49	165.00
19	2,100.00	50	20.00
20	1,450.00	51	118.91
21	750.00	52	137.50
22	1,557.98	53	82.50
23	794.20	54	165.00
24	1,306.25	55	990.00
25	1,000.00	56	400.00
26	1,100.00	57	82.50
27	196.35	58	214.50
28	165.00	59	550.00
29	220.00	60	33.00
30	55.00 [144]		
			<hr/> \$55,423.40

I believe that some discount from the total of the above stated values should be made in considering the property as a unit, as constituting one "outfit", having a market value as such. I believe that we should so regard the property for the purposes of this action, and I determine its fair market value to have been \$50,000.00.

In determining the rental value, I am attaching significance to the long period of time involved, as against the short periods for which equipment usually is rented; also I am not losing sight of the fact that theoretically in our case the property would remain in good condition throughout the rental period, a theoretical fact that would indicate a lower rental rate than would prevail through many shorter leasings covering the same extended period; also I am assuming that some expense would be required ordinarily to condition and repair the property before each leasing. [145]

With these factors in mind, I determine the fair rental value of the Samarkand property from September 28, 1942 to January 12, 1944, to have been \$18,750.00.

I find the fair market value of the Treasure Company property on September 28, 1942 to have been as follows:

1	\$ 110.00	4	192.50
2	1,650.00	5	200.00
3	2,343.65		
			<hr/>
			\$4,496.15

I find the fair rental value of that property for the period in question to have been \$1,700.00.

Judgment is ordered that the plaintiff Samarkand Oil Company have and recover of and from the defendant the sum of \$68,750.00, together with interest on \$50,000.00 at the legal rate from January 12, 1944.

Judgment is ordered that the plaintiff Treasure Company have and recover of and from the defendant the sum of \$6,196.15, together with interest at the legal rate on \$4,496.15 from January 12, 1944.

Stay of execution for a period of ten days from and after the entry of judgment is granted, and if within that time a notice of intention to move for new trial is filed, the stay of execution shall continue in force until the expiration of ten days after the ruling thereon.

October 23, 1945.

William J. Palmer
Judge

[Endorsed]: Filed Sep. 24, 1947. [146]

[Minutes: Thursday, January 9, 1947]

Present: The Honorable C. E. Beaumont, District Judge.

On motion of plaintiff for injunctions against defendants Treasure Company and Samarkand Oil Co. to restrain actions Nos. 507,385; 507,386; 505,967; and 505,968 now pending in the Superior Court of the State of California, in and for the County of Los Angeles, it is ordered that the said motion is denied as to actions Nos. 507,385 and 507,386, the defendants having stipulated that "we will not try those cases until this present case is determined finally", and that the said motion is granted as to actions Nos. 505,967 and 505,968. [147]

In the District Court of the United States, in and for the
Southern District of California

Central Division

No. 2454-B Civil

UNITED STATES OF AMERICA, for the Use of
RECONSTRUCTION FINANCE CORPORA-
TION, a Federal Corporation, Acting in Behalf of
DEFENSE PLANT CORPORATION, a Federal
Corporation.

Plaintiff,

vs.

CERTAIN PARCELS OF LAND IN THE CITY OF
LOS ANGELES, COUNTY OF LOS ANGELES,
STATE OF CALIFORNIA; CITY OF LOS AN-
GELES, a Municipal Corporation, etc., et al.,

Defendants.

ORDER AND DECREE ON PLAINTIFF'S PETI-
TION TO RESTRAIN PROCEEDINGS IN THE
SUPERIOR COURT OF THE STATE OF CALI-
FORNIA BY DEFENDANTS TREASURE
COMPANY AND SAMARKAND OIL COM-
PANY

Plaintiff's motion for an injunction and restraining
order in aid of its Complaint in Condemnation upon plain-
tiff's petition filed herein March 26, 1946, to restrain and
enjoin the further prosecution of that certain action filed
in the Superior Court of the State of California, in Los

Angeles County, on September 27, 1945, as Case No. 505,967, entitled *Treasure Company vs. Union Oil Company of California*; and that certain action filed September 27, 1945, in the Superior Court of the State of California, Los Angeles County, as Case No. 505,968, entitled *Samarkand Oil Company vs. Union Oil Company of California*; and that certain action filed November 10, 1945, in the Superior Court of the State of California, Los Angeles County, as Case No. 507,385, entitled *Treasure Company vs. Union Oil Company of [148] California*; and that certain action filed in the Superior Court of the State of California, Los Angeles County, on November 10, 1945, as Case No. 507,386, entitled *Samarkand Oil Company vs. Union Oil Company of California*, came on for hearing before the above entitled court on April 8, 1946, the petitioner appearing by Joseph F. McPherson, Special Assistant to the Attorney General, and August Weymann, Special Attorney, Lands Division, Department of Justice, its attorneys; and the defendant *Treasure Company* appearing by its attorneys, Bodkin, Breslin and Luddy, by Henry G. Bodkin, Esq.; and the defendant *Samarkand Oil Company* appearing by its attorneys, Bodkin, Breslin and Luddy, by Henry G. Bodkin, Esq.; and the *Union Oil Company of California* appearing by Benjamin and Lieberman, its attorneys, by J. J. Lieberman, Esq., and the motion being fully argued by counsel and thereafter submitted, and the Court being fully advised in the premises, and after due deliberation, now finds and decides as follows:

I.

That the defendants Treasure Company and Samarkand Oil Company have stipulated and represented to the Court in open court that they do not intend to and will not try those two certain actions now pending in the Superior Court of the State of California, County of Los Angeles, entitled Treasure Company vs. Union Oil Company of California, Case No. 507,385, and Case No. 507,386, entitled Samarkand Oil Company vs. Union Oil Company of California, until the above entitled cause in this court is finally determined, and that accordingly plaintiff is not entitled to an injunction restraining the defendants Treasure Company and Samarkand Oil Company from proceeding further in said last above mentioned cases in the Superior Court of the State of California.

II.

That plaintiff is entitled, upon its petition filed herein and upon the files and records of this court, to a temporary injunction, enjoining and restraining the defendant Treasure Company and the [149] defendant Samarkand Oil Company, and their respective agents and attorneys, successors and assigns, and each of them, from proceeding further in those two certain actions now pending in the Superior Court of the State of California, County of Los Angeles, entitled Treasure Company vs. Union Oil Company of California, Case No. 505,967, and Samarkand Oil Company vs. Union Oil Company of California, Case No. 505,968, and each of them, or from doing or attempting to do any act, or taking any proceeding, tend-

ing to fix or determine their rights, or the rights of any or either of them, or petitioner, United States of America, or of any of its agencies and their agents, in connection with, resulting from, or growing out of the entry upon, taking, and continued possession or condemnation of the property, or any portion thereof, described in petitioner's First Amended Complaint in the above captioned proceeding, except such proceedings in this court as are provided for by its rules of practice or by the laws in such case made and provided.

It is Therefore Ordered, Adjudged and Decreed:

That Treasure Company, a corporation, and Samarkand Oil Company, a corporation, and their respective agents and attorneys, successors and assigns, and each of them, be and they hereby are enjoined and restrained from proceeding further in those two certain actions now pending in the Superior Court of the State of California, in and for the County of Los Angeles, entitled, respectively, Treasure Company vs. Union Oil Company of California, filed as Case No. 505.967, and Samarkand Oil Company vs. Union Oil Company of California, filed as Case No. 505,968, or from doing or attempting to do any act, or taking any proceeding, tending to fix or determine their rights, or the rights of any or either of them, or of the United States of America, or of any of its agencies and their agents, in connection with, resulting from, or growing out of the entry upon, taking, and continued possession or the condemnation of the property, or of any portion thereof, described in the said petitioner's First Amended

[150] Complaint on file herein except such proceedings in this court as are provided for by its rules of practice or by the laws in such case made and provided.

Dated: This 27th day of January, 1947.

C. E. BEAUMONT

United States District Judge

Presented by:

JAMES M. CARTER

United States Attorney

JOSEPH F. McPHERSON

Special Assistant to the Attorney General

AUGUST WEYMANN

Special Attorney, Lands Division,

Department of Justice

By A. Weymann

Attorneys for Plaintiff

Judgment entered Jan. 27, 1947. Docketed Jan. 27, 1947. C. O. Book 41, page 477. Edmund L. Smith, Clerk; by R. B. Clifton, Deputy.

[Endorsed]: Filed Jan. 27, 1947. [151]

In the District Court of the United States in and for the
Southern District of California

Central Division

No. 2454-B Civil

UNITED STATES OF AMERICA, for the use of
RECONSTRUCTION FINANCE CORPORA-
TION, a Federal Corporation, acting in behalf of
DEFENSE PLANT CORPORATION, a Federal
Corporation,

Plaintiff,

vs.

CERTAIN PARCELS OF LAND IN THE CITY OF
LOS ANGELES, COUNTY OF LOS ANGELES,
STATE OF CALIFORNIA; CITY OF LOS AN-
GELES, a Municipal Corporation; TREASURE
COMPANY, a corporation; SAMARKAND OIL
COMPANY, a corporation, et al.,

Defendants.

ORDER MODIFYING ORDER AND DECREE ON
PLAINTIFF'S PETITION TO RESTRAIN PRO-
CEEDINGS IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA BY DEFEND-
ANTS TREASURE COMPANY AND SAM-
ARKAND OIL COMPANY

The motion of Treasure Company and Samarkand Oil
Company for an order to modify the order and decree
heretofore made on January 27, 1947, and entered in
Civil Order Book 41, at page 477, came on regularly to

be heard before the Honorable C. E. Beaumont, a Judge of the above entitled Court, and August Weymann, Esq., Special Attorney of Lands Division, appearing for plaintiff, and Henry G. Bodkin, Esq., appearing for defendants Treasure Company and Samarkand Oil Company, and it appearing that at the time of the making of such order of January 27, 1947, restraining the prosecution of certain actions then pending in the Superior Court of the State [152] of California, in and for the County of Los Angeles, it was the intention of the court that such order should constitute a temporary of interlocutory injunction and not a permanent injunction, and the court having heard the argument of counsel and being fully advised in the premises, and good cause appearing therefor:

It Is Hereby Ordered That the Last Paragraph of said order and decree of January 27, 1947, commencing on page 3, line 17, and ending on page 4, line 3, be, and the same is hereby amended nunc pro tunc as of January 27, 1947, to read as follows:

It Is Therefore Ordered, Adjudged and Decreed:

That Treasure Company, a corporation, and Samarkand Oil Company, a corporation, and their respective agents and attorneys, successors and assigns, and each of them, be and they hereby are enjoined and restrained from proceeding further in those two certain actions now pending in the Superior Court of the State of California, in and for the County of Los Angeles, entitled, respectively, Treasure Company vs. Union Oil Company of California, filed as Case No. 505,967, and Samarkand Oil Company

vs. Union Oil Company of California, filed as Case No. 505,968, or from doing or attempting to do any act, or taking any proceeding, tending to fix or determine their rights, or the rights of any or either of them, or of the United States of America, or of any of its agencies and their agents, in connection with, resulting from, or growing out of the entry upon, taking, and continued possession or the condemnation of the property, or of any portion thereof, described in the said petitioner's First Amended Complaint on file herein, until the further order of this Court, except such proceedings in this court as are provided for by its rules of practice or by the laws in such case made and provided.

Done in open Court this 22nd day of May, 1947.

C. E. BEAUMONT

Judge of said District Court

Approved as to form. James M. Carter, United States Attorney; by A. Weymann, Spl. Atty.

Judgment entered May 22, 1947. Docketed May 22, 1947. C. O. Book 43, page 277. Edmund L. Smith, Clerk; by _____, Deputy.

[Endorsed]: Filed May 22, 1947. [153]

[Title of District Court and Cause]

NOTICE OF MOTION FOR ORDER DISSOLVING
AND VACATING INTERLOCUTORY INJUNC-
TION GRANTED JANUARY 27, 1947

To United States of America, for the use of the Recon-
struction Finance Corporation, a Federal Corpora-
tion, acting in behalf of Defense Plant Corporation,
a Federal Corporation, plaintiff, and to Eugene D.
Williams, Esq., Special Assistant to the Attorney
General, James F. McPherson, Esq., Special Assist-
ant to the Attorney General, and to August Wey-
mann, Esq., Special Attorney for the Lands Division,
Department of Justice, Its Attorneys:

You, and Each of You Will Take Notice that on the
9th day of June, 1947, at the hour of 10:00 o'clock A. M.,
of said day, or as soon thereafter as counsel may be heard,
the defendants, Treasure Company, a corporation, and
Samarkand Oil Company, a corpor- [154] ation, will
move the above entitled court in the court room of the
Honorable C. E. Beaumont, in the Federal Building, Los
Angeles, California, for an order dissolving and vacating
that certain order and decree on plaintiff's petition to re-
strain proceedings in the Superior Court of the State of
California, in and for the County of Los Angeles, by said
defendants Treasure Comípany and Samarkand Oil Com-
pany, to-wit, those two certain actions pending in the
Superior Court of the State of California, in and for the
County of Los Angeles, entitled, respectively, Treasure

Company, a corporation, plaintiff, vs. Union Oil Company of California, a corporation, defendant, filed as Case No. 505-967, and Samarkand Oil Company, a corporation, plaintiff, vs. Union Oil Company of California, a corporation, defendant, filed as Case No. 505-968, which said order and decree was entered on January 27, 1947, in Civil Order Book 410 at page 477.

Said motion will be made on the grounds that said order and decree was erroneously and improvidently made and granted and its continuance in effect will work an unjust hardship upon said defendants in that said order restraining the prosecution of said actions, which were commenced for the purpose of recovering possession of certain personal property, consisting of oil well drilling and operating tools, equipment and supplies, particularly described in the complaints in said Superior Court actions, or the value thereof, which said personal property is alleged to have belonged to the respective plaintiffs in said actions on September 28, 1942, and that on said date the defendant, Union Oil Company, without the consent of the respective plaintiffs, wilfully took possession of said personal property and has refused to return the same, or any part thereof, notwithstanding demand was made therefor by the owners thereof; it appearing that the claim of the defendant Union Oil Company in its answers in said respective Superior Court actions to the effect that said personal property was taken by it as agent for the United States of America for the use of the Reconstruction Finance Corporation, a [155] Federal Corporation, acting

in behalf of Defense Plant Corporation, a Federal Corporation, and that said personal property is sought to be condemned in the above entitled action by the United States of America for the use of the Reconstruction Finance Corporation, a Federal Corporation acting in behalf of Defense Plant Corporation, a Federal Corporation, is untenable in that as it appears from plaintiff's petition for injunction that the resolution of the Board of Directors of the Reconstruction Finance Corporation directing the acquisition of said personal property consisting of said oil well drilling and operating tools, equipment and supplies by condemnation was not adopted until October 4, 1943, and that the amended complaint for the condemnation of said personal property was not filed in the above entitled action until January 12, 1944, and that the moving defendants cannot recover any compensation by any award which may be made in the above entitled action for the depreciation of the value of the said personal property between September 28, 1942, and January 14, 1944.

That said motion will be based upon the files, papers and records of the above entitled action and particularly upon the following documents which are on file herein:

1. Resolution of the Board of Directors of the Reconstruction Finance Corporation dated September 8, 1942;
2. Original complaint in condemnation filed September 28, 1942;
3. Order for immediate possession dated September 28, 1942;

4. Amendatory resolution of the Board of Directors of the Reconstruction Finance Corporation dated October 19, 1942;

5. Declaration of taking and decree on declaration of taking filed herein on October 26, 1942;

6. Amendatory resolution of the Board of Directors of the Reconstruction Finance Corporation adopted [156] October 4, 1943;

7. First amended complaint filed January 12, 1944;

8. Conclusions of the court and decision on motion for injunction made by the Honorable Paul J. McCormick and filed herein on June 12, 1945.

9. Affidavit of G. de Bretteville served and filed herewith.

BODKIN, BRESLIN & LUDDY

By Henry G. Bodkin

Attorneys for Defendants Treasure Company and
Samarkand Oil Company

Received copy of the within Notice this 28 day of May, 1947. James M. Carter, by A. Weymann, attorney for plff.

[Endorsed]: Filed May 28, 1947. [157]

[Title of District Court and Cause]

AFFIDAVIT IN SUPPORT OF MOTION TO
VACATE INJUNCTION

State of California,
County of Los Angeles—ss.

G. de Bretteville, being first duly sworn, deposes and says:

That he is the President of Treasure Company and of Samarkand Oil Company, two of the defendants in the above entitled action, and that this affidavit is made in support of the motions of Treasure Company and Samarkand Oil Company for an order setting aside the order made by this Court on January 27, 1947, temporarily restraining said defendants from prosecuting two certain actions entitled, "Treasure Company, plaintiff vs. Union Oil Company, defendant," No. 505-967 in the Superior Court of the State of [158] California, in and for the County of Los Angeles, and "Samarkand Oil Company, plaintiff, vs. Union Oil Company, defendant," No. 505-968 of said Superior Court.

The Plaintiffs in said Superior Court actions seek to recover from said Union Oil Company certain oil well drilling and operating tools, equipment and supplies, including galvanized tanks, loading racks, bolted steel tanks, pipe lines, steel stairway, gauges, valves, nipples, gate valves, electrically power driven pumping plant, sucker rods, jump pump, dehydration tank, trumble gas trap, water lines, gas pipe lines, unitized heavy duty surface

hoist, two cylinder American compressor, 7½ ton ice machine complete, several hundred feet of tubing, none of which items are or at any time were embedded in the land or permanently resting thereon, or permanently attached to that which is embedded in or permanently resting on the land by means of cement, plaster, nails, bolts or screws.

That the tubing above referred to is not embedded in the land but is temporarily placed inside of the metal casing which is surrounded by cement and which casing and cement serve to hold back the adjacent earth thereby forming and maintaining the hole in which the removable metal tubing is placed and in which tubing the sucker rods are in turn placed and upon the end of which sucker rods the pump is attached which forces the oil to the surface of the earth.

All of the above described items and all of the items described in the complaints in the respective state court actions, above referred to, except said casing which is not sought to be recovered in said state court actions, are readily removable and in good oil well drilling practice are from time to time moved from one well to another as drilling operations may require without injury to any of such items sought to be recovered in said state court actions or to the real property.

That by the terms of the lease and sublease under which Treasure Company and Samarkand Oil Company were in possession of the [159] land sought to be condemned in

the above entitled action the lessee and sublessees are granted the right to remove from said land during the term of said lease and subleases and at any time within three months after the expiration or other termination thereof all derricks, machinery, rigs, pipe, pumping stations and other property and improvements belonging to or furnished by the lessee or sublessees.

Wherefore, affiant prays that the injunction heretofore issued restraining the prosecution of the above described state court actions be dissolved.

G. de BRETTEVILLE

Subscribed and Sworn to before me this 22 day of May, 1947.

(Seal)

G. STUART SILLIMAN

Notary Public in and for Said County and State

Received copy of the withinin affidavit this 27 day of May, 1947. James M. Carter, by A. Weymann, Attorney for Plff.

[Endorsed]: Filed May 28, 1947. [160]

[Minutes: Monday, August 4, 1947]

Present: The Honorable C. E. Beaumont, District Judge.

It is ordered that motion of defendants Treasure Co., et al., to vacate injunction be, and it hereby is, denied. [161]

[Title of District Court and Cause]

NOTICE OF APPEAL FROM ORDER REFUSING
TO VACATE DECREE OF INJUNCTION

Notice Is Hereby Given that Treasure Company, a corporation, and Samarkand Oil Company, a corporation, two of the defendants named in the above entitled action, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from that certain order of the District Court of the United States, in and for the Southern District of California, Central Division, made and entered herein on the 4th day of August, 1947, refusing to dissolve and vacate its Interlocutory Injunction granted herein January 7, 1947 and entered on said date in Civil Order Book 410 at page 477, modified [162] by its order duly made and entered May 22, 1947 in Civil Order Book 43 at page 277.

Dated: August 15th, 1947.

BODKIN, BRESLIN & LUDDY

By Henry G. Bodkin

Attorneys for Said Defendants, Treasure Company,
a corporation, and Samarkand Oil Company, a
corporation [163]

Received copy of the within Notice of Appeal this 18th day of August, 1947. James M. Carter, U. S. Atty., by August Weymann, FB, Attorney for Plaintiff.

[Endorsed]: Filed Aug. 18, 1947. [164]

[Title of District Court and Cause]

STIPULATION—RE DESIGNATION OF RECORD;

ORDER—RE DESIGNATION OF RECORD

It Is Hereby Stipulated by and between the undersigned parties, through their respective counsel, that Item 6 of the Designation of Record, dated August 15, 1947, and heretofore filed herein by the defendants, Treasure Company, a corporation, and Samarkand Oil Company, a corporation, reading as follows:

“6. Original Complaint in this action No. 2454-B Civil, those portions thereof as follows:

- (a) Page 1, containing title of Court, number of case, name of document, and name of plaintiff; [176]
- (b) Page 9, line 22, the words, “Samarkand Oil Company, a California corporation”;
- (c) Page 10, line 24, the words, “Treasure Co., Ltd., a corporation;
- (d) Pages 12 to 15, both inclusive; pages 131 to 133, both inclusive. Filed September 28, 1942.”

may be changed and shall be deemed to read as follows:

“6. Original Complaint in this action No. 2454-B Civil, filed herein September 28, 1942.”

Dated: August 20, 1947.

JAMES M. CARTER

United States Attorney

JOSEPH F. McPHERSON

Special Assistant to the Attorney General

AUGUST WEYMANN

Special Attorney, Lands Division,
Department of Justice

By A. Weymann

Attorneys for Plaintiff United States of
AmericaDefendants, TREASURE COM-
PANY, LTD., a corporation, and
Samarkand Oil Company, a corpo-
ration

By Bodkin, Breslin & Luddy

By E. E. Hitchcock

Attorneys for Said Defendants.

Pursuant to the foregoing Stipulation, and good cause
appearing therefor, [177]

It Is Hereby Ordered, that the Designation of Record,
dated August 15, 1947, and filed herein by defendants,
Treasure Company, a corporation, and Samarkand Oil
Company, a corporation, on the 18th day of August, 1947,
be, and it is hereby amended as follows:

Item 6 thereof, appearing at lines 28 to 32, both in-
clusive, of page 2, and lines 1 to 9, both inclusive, of page
3 of said Designation of Record, now reading as follows:

"6. Original Complaint in this action No. 2454-B
Civil, those portions thereof as follows:

(a) Page 1, containing title of Court, number
of case, name of document, and name of
plaintiff;

- (b) Page 9, line 22, the words, "Samarkand Oil Company, a California corporation";
- (c) Page 10, line 24, the words, "Treasure Co., Ltd., a corporation";
- (d) Pages 12 to 15, both inclusive; pages 131 to 133, both inclusive. Filed September 28, 1942";

is hereby amended and changed to read as follows:

"6. Original Complaint in this action No. 2454-B Civil, filed herein September 28, 1942."

Dated: August 21st, 1947.

LEON R. YANKWICH

Judge

[Endorsed]: Filed Aug. 21, 1947. [178]

[Title of District Court and Cause]

STIPULATION FOR ORDER EXTENDING TIME
OF PLAINTIFF TO FILE ITS COUNTER-
DESIGNATION OF RECORD ON DEFEND-
ANT'S APPEAL AND ORDER THEREON

The plaintiff in the above captioned proceeding, having stipulated with the defendants Treasure Company, a corporation, and Samarkand Oil Company, a corporation, that their designation of record on appeal from the order of this Court, entered August 4, 1947, which designation was filed in the office of the Clerk on August 18, 1947, may be amended in certain particulars.

It Is Hereby Stipulated and Agreed that the time for the plaintiff and appellee to file counter-designations of the record to be used in said defendants' said appeal may be extended to and including ten days from the date hereof.

Dated: This 21st day of August, 1947.

BODKIN, BRESLIN & LUDDY

By E. E. Hitchcock

Attorneys for Said Defendants, Treasure Company,
a corporation, and Samarkand Oil Company, a
corporation [179]

JAMES M. CARTER

United States Attorney

JOSEPH F. McPHERSON

Special Assistant to the Attorney General

AUGUST WEYMANN

Special Attorney

By A. Weymann

Attorneys for Plaintiff

ORDER

On the foregoing stipulation it is so ordered.

Dated: This 21st day of August, 1947.

LEON R. YANKWICH

United States District Judge

[Endorsed]: Filed Aug. 21, 1947. [180]

[Title of District Court and Cause]

STIPULATION FOR AMENDMENT OF APPELLEE'S DESIGNATION OF RECORD ON APPEAL NUNC PRO TUNC, AND ORDER THEREON

Whereas, the plaintiff and appellee filed its designation of the record on appeal in the above captioned matter on August 27, 1947; and

Whereas, through clerical error that portion of the record set forth on lines 30 to 32, page 1, and lines 1 to 10, page 2, which appellee intended to designate was erroneously described:

Now, Therefore, It Is Stipulated and Agreed, by and between the said appellants and the appellee, that Item 1 of appellee's designation of the record may be amended nunc pro tunc as of August 27, 1947, to read as follows:

1. Amended Answer of defendant Treasure Company, a corporation, answering plaintiff's First Amended Complaint, including only those portions thereof as follows: [181]

Page 1, showing title, court, number of action, name of document, and caption of action; and the words, "Now comes defendant Treasure Company, a corporation, and answering plaintiff's first amended complaint for itself alone and not for its co-defendants, files this its first amended answer, and answering said first amended complaint, admits, denies and alleges as follows, to wit: "; also the whole of Para-

graph XII of said answer and the whole of Paragraph XIII of said answer. Filed May 28, 1945. and that an order may be entered hereon ex parte.

Dated: This 2nd day of September, 1947.

TREASURE COMPANY, LTD., a
Corporation, and SAMARKAND
OIL COMPANY, a Corporation,
Defendants and Appellants

By Bodkin, Breslin & Luddy

By E. E. Hitchcock

Attorneys for Said Defendants and Appellants

JAMES M. CARTER

United States Attorney

AUGUST WEYMANN

Special Attorney, Lands Division,
Department of Justice

By A. Weymann

Attorneys for United States of America,
Plaintiff and Appellee

ORDER

Upon the foregoing Stipulation, and good cause appearing therefor, It Is So Ordered.

Dated: This 2nd day of September, 1947.

PAUL J. McCORMICK

United States District Judge

[Endorsed]: Filed Sep. 2, 1947. [182]

[Title of District Court and Cause]

STIPULATION EXTENDING TIME IN WHICH
TO FILE THE RECORD AND DOCKET THE
APPEAL. ORDER EXTENDING TIME.

It Is Hereby Stipulated by and between the plaintiff and the defendants, Treasure Company, a corporation, and Samarkand Oil Company, a corporation, through their respective counsel, that the said defendants may have an additional 30 days, to and including the 27th day of October, 1947, in which to file their record and docket the appeal herein, in their appeal from the Order of the above entitled Court by the Honorable Judge Campbell E. Beaumont, made and entered herein on the 4th day of August, 1947, refusing to dissolve and vacate said Court's Interlocutory Injunction granted herein January 7, 1947 and entered on said date in Civil Order Book 410 at page 477, as modified by its Order duly made and entered May [183] 22, 1947 in Civil Order Book 43 at page 277.

Dated: September 23rd, 1947.

JAMES M. CARTER

United States Attorney

JOSEPH F. McPHERSON

Special Assistant to the Attorney General

AUGUST WEYMANN

Special Attorney, Lands Division,
Department of Justice.

By A. Weymann

Attorneys for Plaintiff, United States of
America

Defendants, TREASURE COMPANY, LTD., a corporation, and SAMARKAND OIL COMPANY, a corporation

By Bodkin, Breslin & Luddy

By E. E. Hitchcock

Attorneys for Said Defendants [184]

ORDER EXTENDING TIME

Pursuant to the foregoing Stipulation, and good cause appearing therefor,

It Is Hereby Ordered that the time of the defendants and appellants, Treasure Company, a corporation, and Samarkand Oil Company, a corporation, to file the record and docket the appeal herein in their appeal in this case from the Order of the above entitled Court by the Honorable Campbell E. Beaumont, made and entered herein on the 4th day of August, 1947, refusing to dissolve and vacate its Interlocutory Injunction granted herein January 7, 1947 and entered on said date in Civil Order Book 410 at page 477, modified by its Order duly made and entered May 22, 1947 in Civil Order Book 43 at page 277, be, and the same is, hereby extended to and including the 27th day of October, 1947.

Dated: September 24, 1947.

C. E. BEAUMONT

Judge

[Endorsed]: Filed Sep. 24, 1947. [185]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 184 inclusive contain full, true and correct copies of Complaint in Condemnation; Declaration of Taking No. 1; Decree on Declaration of Taking No. 1; A Portion of the First Amended Complaint; A Portion of the Answer of Samarkand Oil Company; A Portion of the Amended Answer of Treasure Company; Conclusions of the Court and Decision on Motion for Injunction; Plaintiff's Exhibit No. 2 at Hearing of July 2, 1945; Petition for Injunction; Notice of Motion for Injunction and Restraining Order in Aid of Complaint in Condemnation; Answer of Treasure Company and Samarkand Oil Company to Petition for Injunction; Respondent Treasure Company's Exhibit A at hearing of June 10, 1946; Stipulation re Record on Appeal and Order with Notice of Ruling and Notice of Decision; Minute Order Entered January 9, 1947; Order and Decree on Plaintiff's Petition to Restrain Proceedings in the Superior Court of the State of California by Defendants Treasure Company and Samarkand Oil Company; Order Modifying Order and Decree on Plaintiff's Petition to Restrain Proceedings in the Superior Court of the State of California by Defendants Treasure Company and Samarkand Oil Company; Notice of Motion for Order Dissolving and Vacating In-

terlocutory Injunction Granted January 27, 1947; Affidavit in Support of Motion to Vacate Injunction; Minute Order Entered August 4, 1947; Notice of Appeal from Order Refusing to Vacate Decree of Injunction; Designation of Record by Appellants; Designation of Record by Appellee; Stipulation and Order re Designation of Record; Stipulation and Order Extending Time to File Counter-Designation of Record; Stipulation and Order for Amendment of Appellee's Designation of Record on Appeal and Stipulation and Order Extending Time to File Record and Docket Appeal which, together with copy of reporter's transcript of proceedings on June 10 and 11, 1946, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$26.15 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 22 day of October, A. D. 1947.

(Seal)

EDMUND L. SMITH,

Clerk

By Theodore Hocke,

Chief Deputy Clerk

[Title of District Court and Cause]

Honorable Campbell E. Beaumont, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Monday, June 10, 1946

Appearances:

For the Plaintiff: Joseph F. McPherson, Esq., Special Assistant to the Attorney General; and August Weymann, Esq., Special Attorney, Lands Division, Department of Justice.[1*]

For the Union Oil Company: Benjamin & Lieberman, by J. J. Lieberman, Esq., and Allan J. Greenberg Esq., 416 West 8th Street, Los Angeles 14, California.

For the Defendants Treasure Company, and Samarkand Oil Company: Bodkin, Breslin & Luddy, by Henry G. Bodkin, Esq., and G. S. Stilliman, Esq., 1225 Citizens National Bank Building, Los Angeles 13, California. [2]

Los Angeles, California, Monday, June 10, 1946.

10:00 A. M.

The Clerk: No. 2454, United States v. Land.

Mr. Weymann: Ready.

Mr. Bodkin: Ready for Treasure Company.

Mr. McPherson: May it please this Honorable Court, this is in the nature of an ancillary —

The Court: There are several matters here, several subdivisions of this proceeding with reference to the Playa del Rey case.

The Clerk: The first matter the court wishes to hear is the motion of plaintiff to strike amendments to answer of Treasure Company.

*Page number appearing at top of page of original Reporter's Transcript.

Mr. Weymann: If the court please, this is a motion by the plaintiff to strike the first amendment to the amended answer of the defendant Treasure Company, and to strike the amendment to the answer of the defendant Samarkand Oil Company.

The Court: If I recall it, at the last hearing when the order was made by the court, the Samarkand was to follow in the same way as the order regarding the Treasure Company; wasn't that agreed to?

Mr. Weymann: That is correct, your Honor. The amendment to the first amended answer of Treasure Company reads as follows: [3]

"That defendant alleges that World War II came to an end on or about August 9, 1945, and that none of the real or personal property sought by plaintiff's first amended complaint to be acquired by condemnation is any longer necessary for the prosecution of the war effort and that it would not impede the war effort in any degree for the court to deny plaintiff any relief whatsoever in this action."

Aside from the fact that no leave has been granted defendant to file this amendment, it must be apparent that the defense does not state any defense to plaintiff's action, because even if it were true, which it is not, that the war came to end on August 9, 1945, the determination of necessity for the taking of this property is one that rests exclusively with the acquiring agency, and one into which the court will not inquire. And that position is sustained by a long line of cases.

But if we follow out Mr. Bodkin's argument, it would follow that in every case of condemnation where the pro-

ceeding has not been consummated before that date the defendant may request the dismissal of the action. In carrying the *reductio ad absurdum* to its ultimate conclusion, even where title were vested a defendant may come in and ask the court to revest title, so the defense, the statement of the [4] position contains its own answer. There is nothing whatever in this defense. It is not a defense to plaintiff's cause of action under any of the authorities, and we are perfectly willing to submit it on the authorities cited.

Mr. Bodkin: If your Honor please, ordinarily if a demurrer is sustained without leave to amend, the court ordinarily says so; and if the court is silent upon the right to amend, it is ordinarily the rule that an amendment is permitted.

Now, it is true that as to that first defense which was set up in our former answer your Honor did not say, "Leave to amend is granted." Neither did your Honor say, "Leave to amend is not granted."

In this particular case, if the war is over, and while legally there is some question whether it is or not — I can't say whether it is or not — I would say where we are negotiating treaties and things of that kind, where we have brought our armies out of a country, while we may be occupying it as part of a peace program, war can be legally over. And we don't know whether the war is, although the fighting stopped at a certain time, and that is war as it is ordinarily understood.

We have filed our points and authorities on that point, and we would be willing to submit it on that point.

As I say, I didn't understand at the time, when your [5] Honor did not say, "Well, you may amend," that your Honor meant to say, "You may not amend."

In the State courts ordinarily if nothing is said about the matter, you are given a 10-day period within which to amend.

As I understand it, there is no motion made as to any of the other amendments to our answer.

Mr. Weymann: No motion as to any other amendments.

The Court: You have finished, have you?

Mr. Bodkin: Yes.

The Court: Have you anything further to say, Mr. Weymann?

Mr. Weymann: I have this further to say, your Honor —

The Court: You may be seated, Mr. Bodkin.

Mr. Weymann: The cases uniformly hold that power to declare the termination of war rests exclusively with Congress; that it requires a joint resolution of Congress or a proclamation by the President.

So far as the legal effect is concerned, the war is still existent, and there has been no termination of the war or the powers of the government under the war powers.

The Court: At the time of the ruling upon the motion the court was of the view that certain of the counts might well be amended, and it so stated.

I have generally felt since the new rules have been in effect that if a court grants a motion to dismiss that that is an end of the proceeding in so far as the pleading to [6] concerned, unless the party against whom the ruling is made will present a motion to the court and show the court upon the presentation of the motion that the court should permit an amendment.

It is different from the proceeding in the State courts, to which I had been accustomed for a great many years before I came to the Federal Court. There the court

would sustain a demurrer and fix a time within which an amendment should be made. That is, if in the judgment of the party against whom the ruling was made an amendment should be filed.

Here under a motion to dismiss I have always been of the view that the motion to dismiss, if granted, ended the matter as to the particular pleading, unless the court gave leave to amend, and that ordinarily such leave to amend would not be given except upon motion. But in this particular case here the court went over the various counts and stated that as to certain ones, such as fraud and lack of good faith, that the court was very jealous of such a statement, and that if there was anything to indicate that one of the government's officers had been guilty of any oppressive action, then the party complaining should have ample opportunity to present it. So that was the reason for the ruling.

Also, in this particular case where the court gave permission as to certain counts, certain causes of action, and failed to do it as to the other, under the doctrine of [7] *expressio unius est exclusio alterius*, it would imply that the court did not intend that leave should be given to those counts to which no reference was made, and that was the ruling of the court.

I think the motion to strike should be granted, and it is so ordered.

Call the next one, Mr. Clifton.

The Clerk: Motion of plaintiff for injunction and restraining order.

Mr. McPherson: May it please your Honor, this is a proceeding in the nature of an ancillary proceeding in aid of condemnation suit whereby the government as petitioner seeks to enjoin and restrain Samarkand Oil Company and the Treasure Company, two of the defendants named in

the condemnation proceeding, from further prosecuting four actions now pending in the Superior Court of Los Angeles County in the State of California.

Those four suits are against the Union Oil Company as sole defendant.

The Union Oil Company is likewise a party defendant in the condemnation proceeding.

Two of the suits in the State Court are captioned and sound as actions in claim and delivery, under the California statute governing modified proceeding in replevin.

The actions are in the usual form and seek the recovery [8] of what is alleged to be personal property, which it is claimed there under oath was seized and wrongfully taken by the Union Oil Company from the plaintiffs, and in the alternative for damages for detention.

Two of the actions are captioned for damages, and though they sound in trover are in my opinion, and it will be our contention, really such as falls within the inhibition of the statutes enabling this court to protect and preserve its jurisdictions, for while they sound in trover and are captioned actions for damages they are, nevertheless, actions to recover for alleged wrongful extraction of oil from the property by the Union Oil Company, the property being a portion of the lands condemned in this proceeding, and the Union Oil Company being the operative custodian for the government.

I think it would simplify the presentation materially and shorten it somewhat if I would name a few dates.

The original proceeding in condemnation was filed in this court in September of 1942. The court, I think your Honor, signed the order, immediately signed an order of possession, since the action was under the War Powers Act. The marshal served the order and posted the property in accordance with your Honor's direction and put

the Defense Plant Corporation in possession of the property. The Defense Plant Corporation thereafter and pursuant to an agreement which will be introduced as a part of and in aid of his petition, in turn, [9] put the Union Oil Company in operative custody of the property, and it has since that date operated all of the property being condemned, which includes, as your Honor knows, a great deal of property in which the defendants Samarkand and Treasure Company have no interest.

The interests of these two companies, as I understand the proceeding, in the lands and property being taken, is that of an oil lease on two small parcels. One of those parcels, I believe, was in production at the time of the seizure, and both of them had been drilled.

There was in October of 1942 the usual declaration of taking filed with the appropriate order on it. Since the language of that declaration is material, I should like to read one paragraph of it. The lands taken in the estate are described in that declaration and in your Honor's order as follows: For said lands with all buildings and improvements thereon and all appurtenances thereto, the property was taken "for the use of the Reconstruction Finance Corporation, a Federal Corporation, acting in behalf of Defense Plant Corporation, a Federal Corporation, acting under a purported order for immediate possession issued by * * * this court."

That is as it is defined by the defendant in their first answer.

Treasure Company immediately filed an answer to the petition in condemnation in which they asserted, as I just [10] read you, that the taking was for the purpose of these companies acting for the government.

The gist of the defense, which I will not touch on here at great length, was primarily an attack upon the validity

of the taking and upon the valuation of the property, as well as, I think, the mistaken idea that under the California rules of practice it was incumbent upon the government to determine and fix compensation for the taking as required by the California Constitution before the condemnation was effective.

There was, of course, a dissertation on the value of the property and a claim for its taking in the amount of approximately \$1,100,000.00.

The Treasure Company thereafter filed a number of motions, including a motion to vacate your order of possession; a motion to advance the case on the calendar, and things of that kind; all of which are in the clear recognition and submission of this court's jurisdiction and submission to it of determination of the question.

There was an ineffectual effort made to amend the petition in condemnation, since as has been pointed out many times, and will again be, the description of the property taken in the complaint does not expressly include personal property, but describes the parcels by metes and bounds, and obviously includes only the real property and appurtenances [11] as I have read to you.

Thereafter and on January 12, 1944, with leave of court and consented to by the answering defendant, the first amended complaint in condemnation was filed, and that complaint specifically included personal property, including among others the personal property of the answering defendant.

Since that time there have been several amendments to the Treasure Company's pleadings, and there have been answers filed and amendments to the answer by the Samarkand Oil Company. So that while it may not be as finely cast as the pleadings will be before the case is ready for trial, nevertheless for our purpose the case is

at issue and has been for many months prior to the filing of these four suits which we seek to enjoin.

In order that you may have a little more background of it, before the first amended complaint was filed there were two other actions filed in the State Court of California by these same plaintiffs, both actions for claim and delivery. We sought before Judge McCormick to enjoin the prosecution of those suits and were unsuccessful for reasons which I will touch on here later.

The four suits with which we are now concerned, however, were all filed, all four of them, long after the amended complaint including both real and personal property had been lodged in this court, and long after the case for jurisdictional [12] purposes was at issue, and after this court's jurisdiction over the person of these defendants and the question of compensation had been fixed both by law and by voluntary pleadings.

According to the formula pursued by Judge McCormick, we stated four questions for determination, two of them were considered and passed on by him, and while with every deference to that very learned judge we are not in strict accord with the determination that he made on the first application, nevertheless we feel that as applied to the proceeding before your Honor the test is the same and the rule would be applicable whether or no it was to the first application.

The Court: In other words, if I get it correctly, that is the law of the case, is that what you have in mind?

Mr. McPherson: Yes, whether it be on the proper theory or not as applied to the first two suits. Judge McCormick contended himself with ruling that first in time is first in right; and concluding as he did that the State Court proceedings that he was asked to enjoin had been filed before the amendment to the complaint had been

made in this court, that the jurisdiction of the State Court had vested and that the rule of first in time is first in right applied, and that he would not restrain their jurisdiction.

However, as I have just shown by the statement of the facts, all four suits now pending in the State Court were [13] filed long after the amendment was made, and in our opinion long after the jurisdiction of this court had attached.

The reason for that is this: In addition to the pronouncement of Judge McCormick that first in time is first in right, we take the further position, and the record here will show you that the present actions over there, the two which are for claim and delivery, and for the record are actions 507385 and 507386 — I am mistaken about that, they are 505967 and 505968 instead of the numbers I gave, they are the actions for claim and delivery, in addition to being second in time under the rule announced by Judge McCormick, they are actually, contrary to the allegation, and as the record here will show you, not for the recovery of personal property wrongfully detained, but are for the recovery of the operational equipment which under the law of California is a part of the real property, and in our opinion was taken and effectively condemned by the first complaint and were not dependent upon the first amended complaint which was filed some time later.

Actions 507385 and 507386 are the two actions captioned Actions for Damages, and sound in trover.

We take the position that they are such as come within the inhibition of the jurisdictional statute for though they sound in trover they are, as I have indicated before, actions for the alleged wrongful extraction by the defendant Union [14] Oil Company from leaseholds of the

Treasure Company and Samarkand Company, which leaseholds, that is, the lands themselves and their appurtenances, which would include operational equipment, comprised and were specifically included in and formed a part of the lands first condemned by the original complaint.

Taking up first the two actions for damages so-called. Lewis under the law of eminent domain has this definition:

“The term ‘land’ or ‘real estate’ as used in reference to the right of eminent domain includes everything which is embraced by the term where used in its legal sense. —

The Court: Are you just going over one of the authorities you presented before in your points and authorities, Mr. McPherson?

Mr. McPherson: No, your Honor. Just a definition of what we took only. I am not discussing any case.

The Court: Had you given that definition?

Mr. McPherson: Yes, sir.

The Court: In your points and authorities?

Mr. McPherson: Yes, sir.

The Court: You don't need to argue anything that is in your written brief or points and authorities.

Mr. McPherson: All right, sir. The only point I wish to make there in making that definition is that that is the [15] rule of the California cases and is supported by the three cases which we cite in this brief as being the rule of property in California.

The Court: I think for the purpose of this record you had better complete your definition that you were reading. I interrupted you.

Mr. McPherson. The term land as used in a condemnation proceeding includes not only the soil but also

everything attached to it, whether attached by the course of nature, as trees, herbage, water, mines and minerals, or by the hand of man, as buildings, fences, or other structures.

The California cases that bear on that point are three in number. One of them is the famous bank vault case as your Honor knows, which holds that notwithstanding by the terms of the lease the property was personalty as between landlord and tenant, as between a condemning party under a claim of paramount title, such as a condemnation proceeding, the trade fixtures and appurtenances are real property and are taken and condemned when the land is described.

The two actions for claim and delivery are, it seems to me, obviously covered by Judge McCormick's order, and I will not pursue those further.

The difficulty with this case, as I see it, from the point of view of analyzing these pleadings, is the inconsistent and difficult position that defendant's counsel and his client [16] take with respect to who seized this property.

There are perhaps 25 or more specific allegations in this court under oath, before these proceedings were filed in the State Court, all to the specific effect that the government seized his property, claiming of course that it was either illegal or wrongful or ill-advised, or what-not, but nevertheless that the government seized his property and asking compensation. Whereas in the State Court, not only in the two first actions filed, but in these four new ones, the positive allegation is made, likewise under oath, that the property was seized and possessed and retained by the Union Oil Company, as though it were a principal.

Now, we take the position and urge strongly that however ill-advised the original seizure may have been pur-

suant to your Honor's order of possession on the original complaint as affects the personal property that fact is no longer in this case, nor is the determination whether it was broad enough to cover personal property of any moment, because the property that we are now concerned with in these four actions is in two cases oil, which under the law is clearly a part of the real estate, and the operational equipment, which under the decided cases of California, as well as the federal decisions that have passed upon it, are likewise a part of the real property.

So that whether or not certain personal property that [17] may have been covered by the first two suits in the State Court was effectually and effectively condemned in September of 1942 is of no consequence.

This property which forms the subject-matter of these four suits was taken by the law of this court and this State on September 28, 1942, and certainly was taken when the declaration of taking was filed and the deposit made in this court, under any stretch of the imagination, and the effective date of the taking resulting from the filing of the declaration of taking was as your Honor has ruled with the other judges time and time again as of the date the government entered into and seized the possession of this man's property.

Now, if that be true, then under the Constitution and under the Tucker Act the remedies which attend that seizure are exclusive. They are either in the Court of Claims, under the Tucker Act, or they are as we claim exclusive before this court and this judge, because it was your order which put the government into possession of this property.

We take it it is axiomatic that this court, if you had jurisdiction of this action in the first instance, as to which

there could be no dispute, this court will fix all of the consequences of what was done pursuant to your Honor's order, whether it was done rightfully or wrongfully. The attendant circumstances are within your power to fix and within your [18] power to define and to remedy.

Now, I wish to make one particular observation. It was urged strenuously before and is commented on by Judge McCormick in his order. The section of the code which prohibits the Federal Court from signing injunctions in certain cases was touched upon and discussed with him with reference to a matter which is covered in the brief and which I shall not comment on. That is the reluctance that the court has to make such an order restraining proceeding in a sister state court. Nevertheless, we have found and cite your Honor a number of cases, and I think they are particularly pertinent, to the effect that so far as we have been able to find, and it is stated by some of those cases, there never has been an instance where the Federal Government was the moving party and asking for the issuance of an injunction that Section 265 of the Code was even suggested as being a defense to that motion.

The reason is an obvious one. When the Federal Government comes into court to condemn property for a war purpose or not, even under the general condemnation statute, it comes as a sovereign, with the inherent power of a sovereign, which is eminent domain. They don't come as an ordinary suitor.

The cases have decided time and again that you couldn't even counterclaim in such a suit. All of the immunities which attend that act of a sovereign remain in a condemnation [19] suit, as distinguished from proceedings where the government comes and sues as an ordinary suitor. So Section 265 does not apply, provided this one

exception is met, and it is the only one that is put in the books with respect to an application by the Federal Government, and that is that the remedy is not clear and sufficient. In other words, if there is any other way in which the government's rights can be protected other than by the issuance of the injunction, they will not issue it.

There is only one case in which it was refused, and that as you remember was the Dewar case.

So it seems to me that none of the cases cited and relied upon either by Judge McCormick or any of the briefs which I have seen in this case meet the question of this court having had before it on voluntary submission the Federal Government in the exercise of the power of eminent domain to permit any other action to be filed as a corollary or as a collateral attack upon the validity of what your Honor did in connection with that application.

The Court: Mr. McPherson, then did Judge McCormick make his decision upon the principle that you have announced, first in time is first in right?

Mr. McPherson: Yes, sir.

The Court: Or did he do it upon that and other principles? [20]

Mr. McPherson: He mentioned a number of other principles, but the reading of his order, it seems to me, was that he turned the case on the question of first in time.

So that your Honor will get the purport of that, we contended, and I think properly, that the amendment to the complaint related back to the date the government took possession and the seizure by the marshal under the order of this court —

The Court: I am not speaking of what you contended, particularly, but what he used as the basis of his conclusion.

Mr. McPherson: Then he comments on the government's contention with respect to that, and uses the language first in time is first in right, and that in my opinion was the controlling point in his opinion, and he also commented on this Section 265 of the Code which prohibits the issuance of an injunction by the Federal Court in certain cases.

There is another reason which was not argued to Judge McCormick, because at that time the Union Oil Company did not join in the application for the injunction, and there were only two cases filed. Now there will be six when this is disposed of. The Union Oil Company has joined with the government in this application for injunction. It is upon the theory of multiplicity of suits.

We have cited you, and I will not take the time to comment on them, a number of cases holding that where as in [21] this instance there have been a number of harassing suits, that the section has been time and again held by the Federal Courts not to restrict the issuance of an injunction in such a case.

We have another point which was not argued to Judge McCormick, and which I feel is decisive in the case, and that is the rule that our Supreme Court has committed itself to that where an act of a federal agent has been ratified and approved, as in this instance the seizure of this personal property, — though I say it is not particularly material at the moment, because the property we are now struggling about was part of the realty — but assuming you shouldn't agree with me, and hold it was personal property, nevertheless this rule would apply,

where a federal agent seizes such property and his act of seizure is ratified, as in this instance by the amendment and the proceeding for condemnation in this court, that thereafter the agent who seized that property for the government may not be pursued.

We have had a number of cases in the Supreme Court in which that point was squarely and fairly decided. The leading case on the subject came from the Court of claims, and was not cited for quite a long time until after the court got to the case of *The Paquete Habana*, which was an alleged improper seizure on the high seas. It was a libel. The libel was dismissed as being illegal and improvident as well, and the [22] Supreme Court, Mr. Justice Holmes writing the opinion, held as it was held by our Court of Claims in this very early case cited in this brief, that when an act of a federal officer, or agent, has been ratified by the sovereign, that thereafter the agent may not be pursued. The remedies attendant upon such an act are those fixed by law governing the rights of action against the Federal Government and no more.

The reason for that, of course, is very obvious.

Much has been said here and will be said, I am sure, by my opponent to the effect that all he is asking over there and all he can get, and all he got in the first two suits which actually went to trial and which were appealed and compromised on appeal, is a money judgment, and that for that reason your Honor shouldn't endure yourself in restraining an action, the effect of which is to result in a claim for damages and a money judgment.

But is that true? Let's see.

The Court: Have you covered that in your written brief and points and authorities?

Mr. McPherson: Only one phase of it and one phase only, and that is if the government stands idly by and permits the Union Oil Company, who is under this contract that will be shown your Honor to operate this property for the account of the government, stand by and permit them to be used and answer in damages, in the actions for claim and delivery for [23] the payment of damages, the title would vest in the Union Oil Company, theoretically at least, the government would then be and this court would be embarrassed by a prior independent adjudication of the value of the property. Would we be bound to accept the State Court's determination of value, or would we here re-litigate? And if it be, though chances are remote, but if it be that the Union Oil Company should recover less here than they were required to pay in the State Court, what would the position be?

On the other hand, the government is faced, and for this reason alone it seems to me we ought to have the injunction, the government is faced now with the suit against its operating agent, a person it put into custody of this property, to stand by and determine whether it shall appear and defend in the name of the Union Oil Company, as was done in the first two suits, or come here as we come now and ask this court to prevent that suit, because the court would not permit the government to be sued in the State Court if we were named as the defendant.

By the same token the court ought not under the evidence which will be offered to you, and about which there is no dispute, should not permit the agent of the government to be sued for the same reason. That is, that the government is the primary and sole real party in interest, the damages would be payable out of the treasury of the United States, and the [24] valuation fixed over

there would be the valuation fixed here, if by chance it should be the same amount. If not, then an embarrassing situation would have existed and this court's jurisdiction, it seems to me, would have been flaunted.

I have only this to say in conclusion. Of course it isn't fair to the government to have one of its agents sued, as here, upon a claim of tort. That isn't going to wreck the government, but it seems to me that when the government comes into this court in an orderly manner and condemns property, and this court makes an order putting the government in possession, thereafter an amendment was made to correct what probably was a mistake, unquestionably was in my opinion, but nevertheless other people don't agree with me on that, that thereafter this court should not permit a suit or a series of suits, such as we have here, to be filed against the agents of the government who are acting upon the authority of the statute law with the order and approval of this court. If such is the case the government could never, in my opinion, secure as an agent a person of responsibility like the Union Oil Company. And, without more, if as here the government submits itself to your jurisdiction to fix the consequences and to pay the damages which attend the seizure of property under your authority, then these people who are affected by that seizure ought not to flaunt your Honor's jurisdiction, ought not to go to other courts, but ought to come into this [25] court as they have and stay here until their rights are fixed. And if it be that the Federal Government does not fix and pay a proper amount of compensation to these owners, that is a matter which this court would be the judge of; that is a matter peculiarly within your jurisdiction, and a matter, I am sure, that no complaint could be made about.

Mr. Lieberman: Would your Honor prefer to hear us first representing the Union Oil Company, or after Mr. Bodkin gets through? We are here in connection with the motion for leave to join with the government in seeking this injunction. Whatever your Honor prefers as to the order is all right with us. I just wanted your Honor not to overlook the fact that that is before you also.

Mr. Bodkin: If your Honor please, may I suggest that the Union Oil appeared in this case two or three years ago by their counsel; now Mr. Lieberman's firm comes in and he appears for Union Oil Company without any substitution of attorneys. He is filing a petition for the Union Oil Company, who have already appeared by their own counsel. I think it is a little irregular.

The Court: What about that, Mr. Lieberman?

Mr. Lieberman: Frankly, the thought had never occurred to us about a substitution of attorneys. We are here appearing on one matter, and that is this special proceeding. Union Oil Company is of record by other counsel as defendants in [26] respect to a certain parcel in the condemnation. Now we come here only in connection with this special proceeding, because Union Oil Company has been sued in the State Court by these parties on another action in which we are attorneys of record, not the attorneys of record in the condemnation action.

The Court:

In other words, the Union Oil Company has more than one group of attorneys?

Mr. Lieberman: We can explain that, too, because the fact might as well be clear. They have their own counsel in their own office headed by Mr. Griffin, and we appear as their attorney in this suit because —

The Court: You are associated with Mr. Griffin?

Mr. Lieberman: No, I am not. I happen to be agency counsel for the Reconstruction Finance Corporation, so whenever the Reconstruction Finance Corporation has any litigation it calls on me to appear, and I have my firm appear then.

The Court: I am sure there is no real difficulty here. The only thing about it is it has been called to the court's attention. I didn't know of the other appearance.

Mr. Lieberman: The only reason they have two sets of counsel in this particular set of proceedings is that as agency council for R. F. C. we feel it our duty to defend the Union Oil Company, which has been made a defendant in these actions only because of its agency for the Reconstruction [27] Finance Corporation.

Mr. Bodkin: If your Honor please —

The Court: Mr. Lieberman, here what is your connection, then, with the Union Oil Company, as far as this particular proceeding is concerned?

Mr. Lieberman: I am attorney of record, my firm and I are attorneys of record in the State Court in the actions that we are now appearing before your Honor to ask to stay.

The Court: Then have you been authorized by the Union Oil Company, or are you simply appearing on behalf of the Reconstruction Finance Corporation, which is it?

Mr. Lieberman: I have been authorized by Union Oil Company, because the petition is a verified petition, verified by one of the officers of the Union Oil Company.

The Court: What were you going to say?

Mr. Bodkin: If Mr. Lieberman is authorized to appear, I am certainly glad to have him appear.

The Court: I am quite sure of that.

Mr. Bodkin: I just wanted to get the matter straight.

The Court: I think we will take a recess of a few minutes.

(A recess was taken.)

The Court: You may proceed, Mr. Bodkin.

Mr. Bodkin: Before proceeding with my argument, there has been no evidence introduced at all in this proceeding — [28]

The Court: Mr. Bodkin, the court will ask you, as it has Mr. McPherson, not to dwell upon any matters which have been covered in your written argument.

Mr. Bodkin: I don't intend to do that. If I do allude to them at all it will be very brief.

I was saying I have before me a transcript of the proceedings before Judge McCormick in which certain documents were placed in evidence before Judge McCormick in that proceeding, and I simply want to have the same matters which are relevant here in this case.

The Court: May I ask you do you recall why it was that Judge McCormick happened to hear the other matter? Was it before it was transferred to me, or was it because I was away?

Mr. Bodkin: You were at San Diego, and you called Judge McCormick and asked him if he would hear the matter in your absence, and as he was familiar with this matter I assumed perhaps he would hear this during your absence, but he didn't see fit to do so.

The Court: Was he requested to hear it at that time?

Mr. Bodkin: In other words —

The Court: When I was recently away?

Mr. Bodkin: Yes, I think I suggested, or one of us suggested that he might hear it, and he said no he would prefer to have it sent back here.

The Court: That is all right. [29]

Mr. Bodkin: I may say there are two sets of law suits in this case; the one involves oil, oil taken from the ground which the government claims to have condemned, and which condemnation suit we are attacking in our answers which have been filed in this case. We have not set down, nor attempted to set down those oil cases, because of the fact that we realize oil is a part of the land, and if the land was condemned then the oil was condemned. But there is a statute of limitations of three years, and before the three years was up from the time they first went into possession and took over the oil, we then filed a law suit and we let it lie some time and then had service made, but we have not attempted to set and we will not set our attempt to try those two cases until this other matter is out of the way, and if your Honor holds that the condemnation is a valid one, then of course there will be no activity in the State Court.

The Court: That is as far as the oil suit is concerned?

Mr. Bodkin: Yes. On the other hand, if your Honor should hold, as we hope your Honor will hold, that these proceedings were regular and proper and that the court did not have jurisdiction, then we having elected, as we had a right to elect, to sue the principal or the agent, we elected to sue the Union Oil Company, and if this court should hold in its determination that the court did not have jurisdiction [30] in so far as the land was concerned, then we will proceed to trial in the State Court as to the oil, but not otherwise.

The Court: And you will have the protection of having filed your action before the expiration under the statute of limitations?

Mr. Bodkin: Yes. Otherwise we would have to go back to Washington and file our action in the Court of Claims, which we did not desire to do, and we felt that the Union Oil Company was sufficiently sound financially that we would be just as well off to sue them as the R. F. C., which perhaps may be out of business by that time, or to sue the government, which may have plenty of debts, by the way, at that time.

So there is no need of an injunction so far as those oil cases are concerned. We set up in our answer that we don't intend to proceed, and we don't. There is no use of building up straw men and knocking them down.

We at this time ask your Honor to consider as in evidence the order for the immediate possession of real property. That is the original order, which your Honor signed at the time the suit was brought, and which stated it was an order for —

The Court: I think it has been referred to by Mr. McPherson, so that you both agree that it may be referred to by the court.

Mr. Bodkin: Yes.

Mr. McPherson: Yes, your Honor. [31]

Mr. Bodkin. Then we ask that the court consider on this motion, and we offer it in evidence, the original resolution of the Defense Plant Corporation and R. F. C., that is a resolution which provided for the taking of real estate only. And the resolution, I believe, was September 18, 1942. It was upon that original resolution and instructions to the Attorney General to file suit that this present proceeding was filed. You will so stipulate that may be considered?

Mr. McPherson: Provided the amendments to that resolution are also included.

Mr. Bodkin: We will get them all in.

It is my recollection it was September 18th, but whatever the date is. I am sure it is September 18th.

Then there was an amendatory resolution of the R. F. C., I believe, in October, 1942, but, again, that had nothing to do with personal property, it was real property, and we ask that that be considered.

Is that agreeable to you, Mr. Weymann?

Mr. McPherson: Yes, all of the amendments to that resolution.

Mr. Bodkin: All right. Then there was another resolution on October 4, 1943, which we offer in evidence and ask that it be received, which is a resolution, amendatory resolution, which first mentions personal property. And we direct your Honor's attention to that resolution, that it does [32] not ratify the taking of any property thereto.

We ask that your Honor examine that carefully.

And we also ask that the court consider a letter of instructions to the Attorney General directing the filing of the suit for the condemnation of personal property, which letter is dated October 6, 1943. The amendatory resolution of October, 1942, was October 19, 1942.

We also ask that your Honor consider the decree or order of taking which was signed by your Honor in, I believe it was, October, 1942, which referred solely to real estate, and also the decree of immediate possession which your Honor made on September 28th and 29th, 1942, which again refers exclusively to real estate.

We ask that your Honor consider the inventory of the property, of personal property, which is sought to be condemned in the present action.

In the resolution adopted by R. F. C. or Defense Plant Corporation, I forgot which, either one or the other, but

the only resolution on the subject, Resolved that it was necessary to take certain personal property, a list of which was attached thereto, and in the list attached thereto there were two lists, one property necessary to be used in the project, and the other property which was not deemed necessary to be used. I take it it will be stipulated that as to the resolution of October, 1943, that the same list, that is, the [33] original list containing the same headings were attached to the original resolution as are set forth in the inventory filed in connection with this law suit, is that right?

Mr. Weymann: Yes.

Mr. McPherson: The inventory filed in connection with the law suit is a copy of the inventory attached to the resolution.

Mr. Bodkin: With the same headings on it?

Mr. McPherson: Complete as it was attached.

Mr. Bodkin: We ask your Honor to consider on this motion the original complaint filed on September 28, 1942, which refers only to real estate and makes no mention of personal property whatsoever.

The Court: Have you finished with the preliminary matters?

Mr. Bodkin: No, I have some others. Reference has been made, if your Honor please, to the fact that these other law suits were tried. We filed law suits after waiting from September 28, 1942 until November 18, 1943, we filed an action for two separate actions, one on behalf of each corporation, for the recovery of certain personal property. In that particular case the R. F. C., the Defense Plant Corporation, appeared, that is, in the State Court they appeared before Judge Palmer and sought to abate those two actions. Judge Palmer refused to abate them. A copy of Judge Palmer's [34] decision

in that proceeding is in the files, and we ask that that be considered as well by your Honor, as we feel that it is the law in the case so far as these people are concerned, because R. F. C. and Union Oil Company were parties to that law suit. Then when Judge Palmer refused to abate the action, the government appeared in this case and they served notice upon us and upon counsel for the Union Oil Company, seeking to enjoin the trial of those two cases. The cases were tried before — that is, the injunction proceedings took a day's time before Judge McCormick, he took it under submission about three months, and he filed a lengthy opinion. There is in the file, I am sure, the original of the arguments made at that time before Judge McCormick, and much of what was said there is equally applicable here. We ask if your Honor will have an opportunity to read that, because I am sure the original was left with Judge McCormick.

The Court: You mean the original of the transcript of the proceedings before Judge McCormick?

Mr. Bodkin: Yes; it will show that practically the same situation was before Judge McCormick that is before your Honor.

The Court: Mr. Bodkin, do you think this is essentially the same as the matter that was before Judge McCormick?

Mr. Bodkin: There is just one difference.

The Court: Do you think Judge McCormick hesitated [35] because I was away and hadn't requested him to hear this, or did he indicate that he didn't want to proceed?

Mr. Bodkin: I think he was extremely busy at the time, and he said he didn't recall anything about the case. We are certainly very happy to proceed here.

The Court: I understand all that, but at the same time if the matter is one which was before Judge McCormick and you are now asking the court to consider the entire transcript of the proceeding before Judge McCormick, it seems to me that it is almost a duplication.

Mr. Bodkin: I don't think it will be necessary to go that far, if your Honor, please, because we have the opinion of Judge McCormick which we were just about to offer.

The Court: Yes, but you asked me to read the entire transcript.

Mr. Bodkin: I will withdraw that request, if your Honor please.

We then ask your Honor to consider the opinion of Judge McCormick on that, which we say is the law of the case on that situation.

It has been suggested that the only, the main turning point of the case was the fact that we had filed our law suit in November, 1943, and the condemnation of the personal property was not filed, the suit was not filed until January, 1944, and that therefore the State Court first had jurisdiction, [36] that it was an action in rem or quasi in rem, and that being the case that is, of course, one of the points upon which the case turns. But if your Honor will refer to the decisions you will find —

The Court: I would, of course, refer to the decision of Judge McCormick.

Mr. Bodkin, the court really overlooked the statement made by Mr. Lieberman as to his matter, and I thought if you had finished with the preliminary matters I would refer to the motion of the Union Oil Company. Have you finished?

Mr. Bodkin: No, I have not. I wanted to offer in evidence that judgment and, also, if your Honor please,

there were these two cases tried before Judge Palmer, tried upon the merits, claim and delivery actions, and I have a copy of the findings of fact and conclusions of law and of the judgment in that case, which we deem material. I may say that case, the two cases in which we received a substantial judgment, Mr. McPherson said an appeal was taken. No appeal was taken, but they paid us off and settled on a substantial sum before a notice of appeal was given. We have a copy of the findings in the case of *Treasure Company, a Corporation, v. Union Oil Company of California, a corporation, and Reconstruction Finance Corporation, a Federal Corporation. Successor in Interest to Defense Plant Corporation.* The findings were identically the same except as to the property of the [37] two defendants. The findings were identically the same. And while these are not certified, I am offering in evidence and I understand counsel will stipulate that this carbon copy may be used in lieu of a certified copy.

Is that agreeable?

Mr. Lieberman: That is agreeable.

Mr. Bodkin: I particularly direct your Honor's attention to the fact that it says:

"On the said 28th day of September, 1942, at and on said Block 33 of Tract 9809 in said County of Los Angeles, without the plaintiff's consent and against its will, a deputy United States Marshal, without any authorization from any source, without process of court related to said personal property and without direction from any agency of the United States Government falsely and wrongfully and wilfully assumed dominion over the said personal property, and wrongfully and wilfully took possession thereof and wrongfully delivered said personal prop-

erty to the defendant, Union Oil Company of California, a corporation, which said defendant on said date and at said place without right or authority wrongfully and wilfully took possession of said personal property and thereafter continuously and until January 12, 1944, wrongfully [38] and wilfully held possession thereof and detained the same and wrongfully prevented the plaintiff Treasure Company, a corporation, from taking possession thereof."

That was the finding of the court. We offer this in evidence.

The Court: I believe there is no objection, is there?

Mr. McPherson: No objection, your Honor, except we call the court's attention to the fact that the judicial ascertainment there is not binding on the United States.

Mr. Bodkin: This is an action brought on behalf of R. F. C., at the behest of R. F. C.; R. F. C. was a party to that law suit there, and it is a party to this law suit, and the Union Oil Company was there and the Union Oil Company is here; everybody was there except the United States of America, and they permitted this governmental corporation —

The Court: Well, let the two of them be marked as Defendant Treasure Company Exhibit A on this motion.

You have no objection to Mr. Lieberman's motion to join?

Mr. Bodkin: No objection whatsoever.

I may say before I start to argue, I believe they have a copy of the operating agreement which Mr. Lieberman would like to introduce in evidence. We have no objection to this copy being used in the place and stead of a certified copy.

Mr. Lieberman: These offers I will now make, your Honor, [39] will complete the presentation of evidentiary matter that your Honor is asked to consider or record matter.

The Court: I don't think I could hear what you had to say.

Mr. Lieberman: First there is an affidavit of Mr. Paul —

The Court: No. Read it, Mr. Goldstein.

(The record was read.)

Mr. Lieberman: First, an affidavit of Paul M. Lee in support of our petition.

The Court: Your petition in support of what?

Mr. Lieberman: Our petition for injunction here. In other words, we are applying for leave to join in the injunction.

The Court: That has been granted, the leave to join in this motion that is made by the government. Mr. Bodkin states that he has no objection.

Mr. Lieberman: These two affidavits are in support of the application as it now stands. In other words, the joint application for an injunction. Then in addition to the two affidavits we offer this carbon copy of a type-written copy of an operating agreement between the Defense Plant Corporation and Union Oil Company, which Mr. Bodkin stipulates may be used in lieu of an original, and I think Mr. Bodkin will also stipulate with me that by a letter from Reconstruction Finance Corporation to Union Oil Company it was agreed between the [40] parties that this agreement though dated August 25, 1943, should relate back to the time of the original taking by Reconstruction Finance Corporation on September 28, 1942, on which date custody was by it turned over to Union Oil Company.

Do you so stipulate?

Mr. Bodkin: I will stipulate there is a letter in evidence to indicate — there was a letter written.

The Court: Let the proposed copy be received and marked as Plaintiff's Exhibit 1 in this proceeding.

Mr. Lieberman: Does your Honor want to hear anything further from me?

The Court: Not anything further. I just wanted to take up the matter of your motion to join. That has been agreed to and so ordered.

Now, you have offered this exhibit which the court has received and ordered marked Plaintiff's Exhibit 1 in this proceeding.

Now Mr. Bodkin.

Mr. Bodkin: I will be brief, if your Honor please. I may say we have filed some points and authorities. We filed additional points and authorities Saturday.

The Court: I haven't seen those.

Mr. Bodkin: They were sent in Saturday.

In the case here before us we find that on September 28, 1942, a deputy United States marshal, without any process of [41] court whatsoever, went out to the oil fields covered by our oil leases, the property owned by our clients, and simply took possession, ran everybody off. Then when they did so, they had no order — your Honor had given an order that they might take possession of real estate, but nothing at all about personal property. The Union Oil Company then came in and without any authority from any governmental agency, as found by Judge Palmer, took possession of the personal property, and they retained it unlawfully until January 12, 1944. I say "unlawfully" because under the War Powers Act, at the time of filing a complaint to condemn either real or personal property, as the law now

stands and stood on September 28, 1942, and stood on January 12, 1944, the government would have the right to take possession of personal property; and while there is no statutory provision as to personal property about depositing any money to protect the owners, the statute says, in spite of any other law, they have a right to take possession of that personal property at the time the condemnation suit is filed or at any other time thereafter. So that on January 12, 1944, when this suit was filed for the first time seeking to condemn personal property, then for the first time did R. F. C. or the government have the right to take personal property. Any taking prior thereto was unlawful.

And commenting upon that Judge McCormick said:

"The fair preponderance of the evidence before us establishes, we think, that the present claim that it was the intention from the inception of the project to acquire the personalty is an after-thought conceived to avoid possible consequences of the seizure of September 28, 1942."

In other words, when this amended complaint was filed, although the Attorney General knew that the resolution of September 18, 1942, did not authorize the taking of personal property, the amended complaint which was filed on January 12, 1944, alleged that it was taken, that the property was taken on September 28, 1942 pursuant to an intent to them and there take it, or words to that effect. If your Honor will refer to the language in that amended complaint filed January 12, 1944 you will see that the allegation there, of course, is contrary to the unquestioned facts in this case.

They claim a question of ratification, and Judge McCormick held there was no ratification. Judge McCormick said:

"Thus we find that the earliest effectual and authorized acquiring of the personal property by the government was subsequent to the acquiring of jurisdiction over the same res by the State Court in the recovery actions pending therein."

Therefore, a finding of Judge McCormick was that until January 12, 1944 the taking and the withholding of property by Union Oil Company — and I don't care whether they are acting [43] as an agent or acting individually, the thing is that they held that property unlawfully for that length of time. If they did not have a legal authority to take the property in the beginning on September 28 or 29, 1942, when they took hold of that property, if they cannot show that they were legally authorized to take that property, a cause of action then arose in favor of the owners of that property, and that cause of action cannot be taken away from the people who suffered that loss.

I liken this case very much to that of a deputy sheriff who goes on out thinking that there is a process which authorizes his boss, the sheriff, to take over an automobile, but the process is fatally defective, and the deputy sheriff picks up the automobile and takes the deposits that in a storage garage, and the owner of the property comes along and says, "here, I want my car."

"I am sorry, we are holding this for the sheriff."

Where is there any legal authority?

And of course there is no legal authority. Of course, if the storage man acting on behalf of the sheriff was acting on legal process, he could not be sued. But if he

withheld that property, if he withheld that property without lawful authority, even though he thought he was doing right, there is a cause of action which would arise and continue in being so long as he kept that property. [44]

Counsel argued before Judge McCormick, as they are arguing here now, that this proceeding will interfere with the process of this court. Why, it is going to embarrass it terribly.

As a matter of fact, when we got our judgment for \$80,000.00 for the land, for the property, we settled, I think, as I recall it, for \$70,000.00. The money was paid to us not by Union Oil Company, but R. F. C. We got a government warrant for that amount. So the government paid us for it. And certainly if the government paid us for it, and the government is seeking to condemn it, there will be no problem before your Honor, because we can't come into this court and collect for that property which we have already been paid for.

It was argued before Judge Palmer — it was argued before Judge McCormick that this case should be enjoined because it would interfere with the process of this court. had this court taken jurisdiction. Judge McCormick concludes by saying:

“We conclude with the observation that the injunction to restrain proceedings in either of the State Court actions is unnecessary under the record before us. In the local suits no relief to the oil companies other than money judgments appears to be now possible. Such an outcome in the State Court would neither impair nor defeat the jurisdiction of this court in the condemnation [45] proceeding.”

The Court: That money judgment was based upon the taking of the personal property?

Mr. Bodkin: Taking of the personal property on September 28, 1942. And Judge Palmer allowed us the reasonable market value of the property at that time, together with damages for its withholding until January 12, 1944, holding in that case that the withholding during that time was unlawful and we were entitled to the reasonable use value of the property during that time. And from January 12, 1944 —

The Court: I think you have answered my question. It was entirely based upon the taking of the personal property?

Mr. Bodkin: That is true. Nothing to do with the real property at all.

A sufficient answer, I believe, to the argument of counsel would be the opinions by Judge Palmer in which he discusses the various judgment which might be entered. Pardon me. Will your Honor pardon me just a moment? I was trying to find, if your Honor please — Judge Palmer in the recent trial in 1946, the case we tried and which was recently decided, made a decision first on the question of liability, and then he went into the question of the amount of the judgment, and I was sure I had a copy here of his judgment. If not, I would like permission to file a copy of that with your Honor.

The Court: What was the Exhibit 1 or Exhibit A? Were those the findings? [46]

Mr. Bodkin: Yes, those are the findings, if your Honor please. The statement of the court as giving his reasons, I thought, might be —

The Court: In the judgment that was based on the findings?

Mr. Bodkin: When we tried the case first —

The Court: You mean he gave an opinion?

Mr. Bodkin: He gave an opinion at the conclusion of the trial on the question of liability. And when he decided that the defendants were liable —

The Court: It is that opinion that you want to present?

Mr. Bodkin: Yes.

The Court: Proceed, Mr. Bodkin.

If there is no objection, you may file it with the clerk of the court.

Mr. McPherson: It would fall in the same category as the observation made on Judge Palmer's findings on the evidence.

Mr. Bodkin. We conclude, if on September 28, 1942, when these various properties were taken from us, and retained until January 12, 1944, a cause of action came into being at that time on September 28th or 29th, 1942, and it continued in being against the Union Oil Company so long as the Union Oil Company retained in its possession the personal property, we have a right to go in there, into that court, and to [47] try those cases the same as we tried the other cases before Judge Palmer; to have the court determine, first, as to this other personal property, was the original taking lawful or unlawful? If it was unlawful, then was it retained by the Union Oil Company until January 12, 1944? And the court will find on that that it was retained by the Union Oil Company.

Now, I say regardless of whether the Union Oil Company was acting as an agent of the government or act-

ing as an agent of R. F. C., the fact remains that they can show no lawful authority for taking the property or withholding it from us.

The evidence will show we made repeated demands for it and it was turned down. They would not give it back to us.

We say we have a right to go into court and to try — not the case that is going to be tried before your Honor; your Honor is going to try this case, on January 12, 1944, when this suit was filed seeking by its amended complaint to condemn personal property, your Honor will be limited in determining the value of that property and the damages sustained by us by the value of the property at that time, January 12, 1944.

The findings here will show that this property became practically valueless between September 28, 1942, when it was allowed out in the fields unprotected —

The Court: You say "this property"; you mean the [48] personal property?

Mr. Bodkin: Yes, that property was allowed to deteriorate and rust away. And then at the end of that time when they filed this amended complaint, they sent out two or three junk men to the field, they appraised it as junk, they wanted to pay for it as junk, and we say that we have a right in some court to recover the value of the property at the time it was unlawfully taken. And we are seeking in that case — as Judge McCormick said and as Judge Palmer held, we could not recover the prop-

erty, because the property at the time the suit was tried was in the possession of the R. F. C., but the court held that we were entitled to recover the reasonable market value of the property at the time it was taken, together with the reasonable rental value until January 12, 1944, and interest at 7 per cent from that time on.

We feel that the courts do not favor these injunctions. We must assume, if your Honor please, that the State Courts are going to decide the cases according to law. If they don't decide the cases according to law they have an appeal to the Supreme Court of California; and if the Supreme Court does not decide it according to law, they can have it reviewed by the United States Supreme Court. They have ample remedy at law so far as this action is concerned.

We can't assume that the State Court is going to go out and go wild on something. They are going to decide it accord- [49] ing to law.

Counsel must have felt it had been decided according to law, because they paid off the other judgments.

We feel to restrain us from enforcing our judgment, which I say, and as the decisions point out, where they are different remedies — in this case we are seeking to get our damages for the withholding, detention of that property, the taking, and we feel that that will not in any wise, in any manner whatsoever interfere with this condemnation proceeding up here. If we get a judgment there it will be paid for; we will be paid and this court will not have the bother of going ahead through a long trial and determining whether the property was lawfully

or unlawfully taken, the value, or the damage sustained at all. It will be taking a burden off of this court.

But the gist of this, if your Honor please, and the reason they are so vigorously opposing it is this: In an action in the State Court we have a right to recover the reasonable value of the property at the time it was taken, together with reasonable rental value so long as it was unlawfully withheld, and oil property, oil drilling equipment and tanks and things like that have a very high rental value, so that so far as we are concerned we could recover a larger judgment there for that damage than if were to go in and say — [50]

The Court: You say you could recover it there; where do you mean?

Mr. Bodkin: In the State Court.

The Court: It would be to your advantage to try it in the State Court?

Mr. Bodkin: It would be to our advantage to try it in the State Court, certainly. And we feel if we have that lawful right we should be permitted to use that lawful right.

On the other hand, your Honor is going to decide this case according to law, and your Honor will hold that until January 12, 1944, there was no condemnation of personal property, no suit to condemn it, therefore the time fixing the value is the time the condemnation suit was started, and that is January 12, 1944. And if your Honor holds that way and allows us a judgment, it will be the value of that property which was allowed to rust

away and deteriorate greatly, and we will have nothing for that period of time in which it was withheld from us during the very active periods here in the oil business in California, and we feel that your Honor should hold as Judge Palmer held and as Judge McCormick held.

I say while it is true that in an action in rem the court which first acquires jurisdiction has jurisdiction to determine the issue before the court first acquiring jurisdiction, the only issue before that court is whether the taking [51] of the property on January 12, 1944 was valid. It can't go back and decide something where property was taken absolutely without any power, without any authority, without any right.

We feel we should be permitted to pursue our remedy there. I trust your Honor will read the briefs which we have filed.

Mr. Lieberman: May it please the court —

The Court: Mr. Lieberman, how long is it going to take you?

Mr. Lieberman: Not over 10 minutes, and maybe five.

The Court: Mr. McPherson, how long do you want?

Mr. McPherson: I would say about 15 or 20 minutes.

The Court: It is five minutes to 12:00 now. I have matters this afternoon, so the court will continue this until tomorrow morning at 10:00 o'clock.

(Whereupon, at 11:55 o'clock a. m., Monday, June 10, 1946, an adjournment was taken until Tuesday, June 11, 1946, at 10:00 o'clock a. m.) [52]

Los Angeles, California, Tuesday, June 11, 1946, 10:00 a. m.

The Court: Proceed.

Mr. Bodkin: If your Honor please, yesterday I spoke of the decision of Judge Palmer, which I desire to file in this case and I have it here.

The Court: Is there anything else here except his decision?

Mr. Bodkin: That is just his decision on the question of liability, and discussion of various cases.

The Court: He wrote quite an opinion, didn't he?

Mr. Bodkin: Yes. It was tried on the question of liability first, and the matter was under submission and decided, and then later on we tried the question of the amount of damages.

Mr. Lieberman: If it please the court.

The Court: Mr. Lieberman.

Mr. Lieberman: It seems to me that the admission that counsel made yesterday to the effect that the two cases which they brought in the Superior Court, and which are included in the four cases we are asking this court to stay, which asked for the value of oil and gas extracted from the property under condemnation and their leaseholds, that when he admits, as he did, that those are not proper cases now, that they have no cause of action now, that they were brought only to beat the [54] statute of limitations in the event this court should ultimately dismiss the present proceedings, condemnation proceedings, that when he makes that admission he confesses in effect our application for an injunction, because he admits it is not proper to proceed with those cases. To that extent, therefore, there is an admission here that we are being harassed by this unnecessary

multiplicity of law suit, predicated solely on the possibility that the condemnation proceedings may be dismissed.

Now, let's go a step further. The other two cases are claim and delivery actions; they are actions in rem; they seek an order of court redelivering to the plaintiff personal property alleged by him to belong to him, plus whatever damages may flow under the rules of damages in the State of California.

There must be an alternative judgment in a claim and delivery action, either for redelivery or for the value.

Now, what is he seeking to recover?

For the most part the property itemized in the action in the Superior Court in the two claim and delivery actions comprises pumping equipment. In the previous two cases — we tried them as one case — the equipment was all drilling equipment.

The reason for the taking of drilling equipment, as distinguished from pumping equipment, was as the evidence showed, while drilling equipment is used primarily for drilling a new [55] well, it is used often — as it was in this case — as stand-by equipment, so that when the well has to be pulled or operations cease and they have to drill deeper, they have got the drilling equipment there in order to facilitate continuation of operations. That is why this drilling equipment was there, one of the reasons why it was on these premises.

They have some drilling equipment involved in this lawsuit, but primarily, and I think for the most part, you will find it is pumping equipment. Some of that pumping equipment is a part of the well; it is installed in the ground; it is affixed to the ground; it is an integral part of this land, and it is therefore real property and can't be treated as personal property, just as much as the oil

and gas was real property. It was a part of the land that was condemned, title vested in the United States on February 28, 1942. So title in this pumping equipment vested in the United States on that date. If that is correct, then certainly they can't obtain a judgment in the Superior Court. If that is correct, then certainly it is a part of the valuation to be fixed in this condemnation proceeding. And if at the same time we have got a case going on in the Superior Court, and it should go to judgment there, and the judgment is granted there for all of the alleged equipment, how is there to be a segregation between the amount of the judgment paid for or the amount of [56] the equipment paid for in the judgment in the Superior Court, and the amount and value to be determined in the proceedings in this court?

I am trying to show the effect, your Honor, of a judgment in either or both courts, to show how the Superior Court proceedings do interfere with the jurisdiction of this court, and interfere with the proceedings that are pending in this court, and necessarily interfere, they inevitably interfere with the findings that this court has to make before it can properly determine the proceedings here.

Now, you can't segregate for the purpose of this proceedings, for the purposes of this petition, the personal property that they may have a right to go into the Superior Court on, and the other equipment that is a part of their alleged personal property recovery suit, which is, in effect real property; and this proceeding in the condemnation case can't be finally determined without the court determining the question as to whether or not that equipment or any of it or all of it is real property.

Under certain views it can well be held that even drilling equipment that is used as stand-by for the facili-

tation of the operation of pumping equipment, which is in itself real property, that it is all one and consequently all to be treated as real property.

Now, let's forget the real property phase for a moment [57] and come back to the effect of Judge McCormick's decision.

In my humble opinion the entire effect of Judge McCormick's ruling, whatever opinions he may have expressed on other questions that were argued, the effect of the ruling was that the action here could not be abated, I mean this court would not abate the Superior Court action, if there was a priority of assumption of jurisdiction or vesting of jurisdiction in the Superior Court; and he found that there was. He found it first by the holding that this action on February 28th was only for real property. It didn't include personal property. That if there had been any doubt about it the amendment filed on January 12, 1944, was an admission that the original complaint didn't include the personal property. Consequently, so far as the personal property part of the condemnation was concerned, it started in January, 1944, and that the original taking of possession was not pursuant to the processes of this court which had been issued on September 28, 1942, that all that took was real property, since title in the personal property vested as of January 12, 1944, the date of commencement of the personal property condemnation, because that was the date of the amendment — and the effect of the ruling being that this did not, this amendment did not translate back to September 28th, for the purposes of the personal property. In other words, we argued that an amendment dates back to the date of original [58] complaint. They argued that this was in effect a supplemental complaint and not an amendment.

I assume Judge McCormick held with them, because he held that this amendment dated as of the date of its filing, January 12, 1944.

That being the case that was the time that we vested this court with jurisdiction of that res, whereas the Superior Court had already been vested with the jurisdiction of that res prior to that time in September of 1943, or whenever the Superior Court action was started. I think it was September or November.

Mr. Bodkin: November 15, 1943.

Mr. Lieberman: These actions are September and November of 1945, a year and nine months and a year and eleven months after this court had already been vested with jurisdiction of the personal property phase of the action, and I have already pointed out that this case can't be finally and properly determined without this court making a determination as to which of this property was personal and which of this property was real.

So I submit, if it please the court, that regardless of the proceedings in the Superior Court on those two cases, the ruling of Judge McCormick can be the basis of your Honor's ruling that this court having been vested first with jurisdiction it should retain that jurisdiction without interference [59] by any other court, and, finally, from the other phase of it, harassment of a defendant by a multiplicity of actions.

The original action should have included all of this alleged personal property. An amendment was sought in the Superior Court at the time of trial, in the midst of trial, to add some of this equipment or add all of this equipment that is involved here. The only reason or explanation for it was that it was overlooked at the time of the preparation of the inventory that was made a part

of the original complaint in the Superior Court. Objection was made to the amendment of the complaint at that late date on the ground that the defense of the action required the use of experts, and these experts had been required to go out on the premises and to make an examination of the premises, an examination of all of the personal property that was being sued for, and the defense had not had any of its experts examine any of the equipment that was sought to be included in the amendment. The court sustained the objection to the amendment.

Now, I submit, if it please the court, that the question may well be raised, and we may be right in raising that question, that when a person brings suit for the recovery of certain equipment which is all a part of one process and a part of one ownership, and a part of one inventory, and a part of one taking, that he has lost his right, having sued for a part of it, to sue for the rest of it. [60]

But that isn't a question for determination here. I am raising these questions, your Honor, to show you the many questions that would be involved in the trial of these proceedings, and how they are interwoven inextricably with a determination of the condemnation.

The Court: Mr. Lieberman, before you go I want to ask you a question. By the asking of it I don't want you to think that I am doing it in an argumentative way at all, or that I am taking any position, but just for enlightenment, that is all.

The first taking was in November, 1943, I believe you stated?

Mr. Lieberman: September 28, 1942.

The Court: What is it?

Mr. Lieberman: September 28, 1942 was the actual physical taking, and the date of the decree of possession. January, 1944, was the first time —

The Court: What was the date in November?

Mr. Lieberman: November is the date they brought suit.

The Court: All right. I don't want that. Let me get this —

Mr. Lieberman: November, 1943, is the date they brought suit.

The Court: Wait just a minute. When was the actual taking of the personal property? [61]

Mr. Lieberman: September 28, 1942, personal and real were taken on that date.

The Court: When the amendment made to the complaint?

Mr. Lieberman: January, 1944, the amendment which specified the personal property. January, 1944.

Mr. Weymann: January 12, 1944.

The Court: There was a period there of a year and some months. Now, during that time the possession was taken by the marshal; is that correct?

Mr. Lieberman: That is correct.

The Court: And the property was delivered to the Union Oil Company?

Mr. Lieberman: He turned it over to R. F. C., and they immediately turned it over to Union Oil Company.

The Court: The contention of Mr. Bodkin is that his people were deprived of that property during all that period, more than a year, and that they will have no recourse for the lack of possession during that time they were deprived of the use of that property, and that it depreciated in value. What have you to say about that?

Mr. Lieberman: I think if the court here has jurisdiction, I think there can be no question about it, the court here must necessarily determine the date of possession, and will then determine either that the value to be allowed for the taking was as of the date of the actual first physical [62] taking of possession, if the court finds that under the War Powers Act they had a right to do that, or if the court should hold, as Judge Palmer did, that it was an unlawful taking in September, 1942, and that therefore there was an unlawful holding between that time and the time in January 12, 1944, when it became a lawful taking here, I don't see how the court can avoid allowing damages here in this action.

The Court: Well, you mean as of September 28, 1942?

Mr. Lieberman: I think it will either have to allow valuation as of September 28, 1942, or as of January 12, 1944. If it decides that the valuation has to be as of January, 1944, because that was the date of legal taking, then it was to allow something for the period intervening during which time the government was in possession.

The Court: Is that involved in this type of action?

I say I am just asking for enlightenment because I want to get the views here of all of you on that point.

Mr. Bodkin has expressed himself very definitely there, and he holds that by the failure to allow the plaintiffs to proceed in the State Court, that they will be deprived of a very substantial part of their property of deterioration. Of course that would be very appealing if he is correct in that. And that there is no recourse, plaintiff would have no recourse.

Mr. Lieberman: My answer to that would be, your Honor, [63] first, if the court here should find that the

date of valuation is as of the date of original taking, on the ground that under the War Powers Act the government had the right to take it, then it will be this court's determination under the federal rules that that was the date of actual — the date they were entitled to compensation for the value. If they are entitled to compensation for the value as of that date, then we became the owners as of that date and they were entitled only to compensation.

The Court: Suppose the court should say the order of the court was that they take the real property, they had no business to take anything else, and the government shouldn't have to pay for anything and couldn't pay for anything except from the date of the legal taking, and that there would be some deprivation as Mr. Bodkin has stated; then it would appear that there would be a loss without any recourse, unless you can state to the court what it would be. And, of course, if that is the situation it would be very appealing to the court in considering a matter of this type, which is the basis of an equity proceedings —

Mr. Lieberman: I think I have the answer to that.

The Court: I would like to know what it is.

Mr. Lieberman: This injunction, after all, is not an application for a dismissal of the Superior Court case. The effect of this injunction is to abate the proceedings. The [64] case remains on the calendar there; it can't be dismissed even under the State Court rules for lack of prosecution, on the ground that the failure to prosecute was not the fault of the plaintiff, it was an order to the Federal Court. Since the Federal Court may have to decide all of these questions that we have been discussing here this morning, this court's jurisdiction can't be exhausted and be interfered with by the State Court until

this court has finally determined all of these questions I have discussed.

If the court should finally determine on the date of the judgment in the condemnation action, that the taking was on January 12, 1944, that the taking prior to that time, therefore, was unlawful, the judgment in effect will be a recognition of the unlawful taking and the unlawful holding between September, '42 and January, '44, thus leaving that part of the cause of action to be proceeded with in the Superior Court. But it shouldn't be proceeded with, because if the court here should rule according to certain of our views, then whatever proceedings would be had in the Superior Court would interfere with that.

The Court: Your position is if the court takes that last position and decides that the taking was as of January, 1944, that there would be no interference with the right of the plaintiff to proceed in the State Court with its case based on the intervening time from September 28, 1942? [65]

Mr. Lieberman: That is right. Exactly the same as if this proceeding here would be finally dismissed there would be no interference with Mr. Bodkin's proceeding with his presently filed action for the recovery of the gas and the oil.

The Court: If that is the situation, then of course the argument that it could all be decided in one suit would not prevail.

Mr. Lieberman: Unless I am right in my contention and in my view that this court will have the right and the duty to determine not only the value as of January, 1944, but also the value of the withholding prior to that time.

The Court: It could only do that if it held that the taking was lawful, is that correct?

Mr. Lieberman: The taking became lawful in January, '44.

The Court: It could only do that if the court would determine that the taking was lawful as of September 28, 1942.

Mr. Lieberman: Under the War Powers Act. Maybe you are right.

My view was that once the court has acquired jurisdiction in a condemnation proceeding, and has to determine a value of whatever date, if it develops that there was an actual taking prior to the lawful condemnation, that it is within the jurisdiction and within the duty of this court to make a determination of the value of the withholding also. [66]

If the court should say that under the federal rules they are not entitled to that type of measure of damages, if Mr. Bodkin is arguing that he has a more favorable measure of damages in the Superior Court, then that shouldn't be an argument against this stay here, because if this jurisdiction was vested in this court prior to that of the Supreme Court, this court acquired jurisdiction and he is out of luck on his measure of damages, just exactly as we were out of luck on the measure of damages he having acquired jurisdiction in the first two actions in the Superior Court.

The Court: The court, I think, is entitled to know your views.

Do you think the court had jurisdiction over the personal property on September 28, 1942?

Mr. Lieberman: I do, under the War Powers Act, and we are all agreed on that. I don't know whether

other two counsel, who are more expert in condemnation law than I am — mine dates back a long period and this is recent — but we have all taken the position here that under the War Powers Act it required no order of court to take possession: that it was the intention and purpose of the War Powers Act to give immediate and summary right in the government to take whatever it required, and the Constitution gave to the person who was deprived of his property his remedy.

The Court: Let us put that more concretely. Is it your [67] opinion that the court had jurisdiction over the personal property under the order of September 28, 1942?

Mr. Lieberman: Yes.

The Court: What is it?

Mr. Lieberman: Yes, it is our opinion.

The Court: Have you finished your argument?

Mr. Lieberman: Yes.

The Court: Very well.

Mr. McPherson: May it please your Honor, I think you have well put what is likely to be one of the controlling points in the case, and one which we argued with much vigor before Judge McCormick, and with equal force before Judge Palmer.

The answer to my mind is a very simple one. The jurisdiction of this court attached to all phases of this acquisition, including all of the property as to which the government went into possession, on September 28, 1942, for a number of reasons, some of which have been mentioned by Mr. Lieberman. The most recent pronouncement on the subject is a case referred to in our brief, which I didn't mention yesterday because of your Honor's injunction that we not follow the form and order of the brief, as I understand it. The point is this:

In the *Yearsley v. Ross Construction Company* case, which was decided very recently in 309 U. S. 18, (the opinion by Mr. Chief Justice Hughes) the point involved was practically [68] the same. There is dredging contractor doing reclamation work on one of the large rivers had set up some paddles and pumps and had backed up an old rear wheeler boat and was sloughing away the land of the adjoining property owner with a view of straightening the contour. He brought suit against the *Yearsley Construction Company* in the District Court. The *Yearsley Construction Company* set up its contrast with the engineers, showed that the statutory authority existed for doing the reclamation work on the river in the manner and under the specifications filed. There was never actually any condemnation case ever filed. The judgment was against the construction company in the lower court for the value of the riparian owner's land thus destroyed. The government appeared *amicus curiae* in the Supreme Court; the point was argued at great length, and the point was disposed of in one paragraph, and it is this:

"The adoption by the United States of the wrongful act of an officer is of course an adoption of the act when and as committed, and causes such act of the officer to be, in virtue of the statute, a rightful appropriation by the government, for which compensation is provided."

The Court: Your contention is that the government confirmed the action in taking the personal property on September 28? [69]

Mr. McPherson: Yes, your Honor, that is one phase of it. Then I think the amendatory character of those resolutions which were offered by Mr. Bodkin, and which

were heard on the first application for injunction, together with the amendment of the complaint in this court, which amendment dealt practically exclusively with personal property, as distinguished from real property, related the cause of action back to the original day on which it was filed. That is another phase of the case.

Third, a point which I wish to comment on, and which was not referred to by Mr. Lieberman, was the rule of the Supreme Court in the *Paquete Habana* cases; that whether or not the act was wrongful when and as committed, that once the Federal Government ratifies it, adopts it, and pursues it as its act, there is no remedy under the American system of jurisprudence against the agent through whom the sovereign power committed the wrong, if it were wrong in the first instance.

Now, with every deference to Judge Palmer and to the opinion which you were asked to read this morning, frankly, it seemed to me astounding. No one of the cases cited by Judge Palmer in that memorandum opinion, no one of them had in it a single feature of the point of law argued to Judge Palmer on this very point.

The point was made that when an act of an agent of the Federal Government has been ratified, that there is no remedy, [70] no right to pursue further the agent who did the wrong.

The cases that he cites in answer to those which we set up, and some of them are referred to in our brief which we filed before you, we left out some because we wanted to shorten it, the cases he cites without exception deal with the right of the Federal Courts to enjoin the commission of an act by a federal agent not authorized by law, before it is committed.

They have no more relation to our problem than does —

The Court: In other words, there is no element of ratification?

Mr. McPherson: In those cases. Those were actions in equity to restrain a federal officer.

The Court: Let me ask a question here now. Did I understand correctly that no appeal was taken from these cases, these judgments of Judge Palmer?

Mr. McPherson: I stated yesterday when I argued the case there was an appeal. The Attorney General directed one to be taken. But I now understand they were compromised before the appeal was perfected.

Mr. Lieberman: That is right.

Mr. McPherson: But they were paid, if your Honor please, by check drawn on the Treasury of the United States.

Have I stated my position with respect to this relation back as you wish it?

The Court: Yes. [71]

Mr. McPherson: There is one other feature of the case, it seems to me, that is not cited in our brief, that if your Honor wishes to pursue it, it will be helpful, and that is the line of cases that we know as the Shoshoni cases. They were expropriations by the Indian agents of lands of the civilized tribes, putting schools on one tribe's land for use of the other, which continued over a period of many, many years, thirty, forty years, as I remember it, and the valuation was, of the property, as of the date the original entry was made.

Then there is the North American Transportation Compaany case, which was an extrajudicial entry by an Army officer into certain lands up here in this very circuit, I believe it was in Washington if I am not mistaken, in which the subsequent ratification was held to relate back to the date on which he took the property.

My recollection of that case is that it is North American Transportation Company.

I will give you those citations if your Honor wishes them. They are not in the brief.

The Court: Don't give any additional citations unless you think it is necessary. You have given citations, I think, on every point here.

Mr. McPherson: Some of them, yes.

The Court: Sometimes we get to discussing collateral [72] matters and they assume quite important positions at the time of argument, when they really are more or less collateral.

Mr. McPherson: I thought so myself. Then one of the statements that Mr. Lieberman made I wish to subscribe to, as counsel of record for the government in this case, so you will have our position, and that is that whatever disposition this court makes of the point — that is, the subject-matter of the suit, and of which you have jurisdiction, that is to say, whether they should be compensated back of January 12, 1944, must be first made by this court before there is any right of action against this agent in the Superior Court of Los Angeles County. So that until you make that decision Mr. Bodkin hasn't, as he contended, been deprived of any right.

Of course, I don't think that you will make such a decision.

The only other matter that I wished to bring to your Honor's attention until this point was called is this: Perhaps unintentionally, but there was, it seemed to me, some suggestion that there was no real difference between the problem presented to you for determination and that presented to Judge McCormick. I want to touch very lightly on what those differences are. Those

that were mentioned by Mr. Lieberman I will not refer to, in order to shorten it.

The primary difference was that in the application before [73] Judge McCormick we were seeking to enjoin and restrain the prosecution of two actions in claim and delivery, having to do with the recovery of possession or damages for detention of purely personal property. The actions which you are asked to enjoin this morning do not relate in any way to personal property. The property which forms the subject-matter and predicate for the four suits that we are seeking you to restrain the prosecution of is all real property. And if we are correct in our contention that was in fact real property, and I am sure it will not be denied, then the date that you are concerned with as to your jurisdiction is September 28, 1942 and not January 12, 1944 as has been suggested.

The Court: Mr. McPherson, I don't want to prolong this argument at all, but you are now speaking about all of it being real property?

Mr. McPherson: Yes, sir.

The Court: Mr. Weymann, may I ask you a question?

I guess I should, but I don't exactly recall all the details in the Block case. What was the distinction in the Block case?

Mr. Weymann: The distinction in the Block case was that a separate date of valuation was contended for so far as concerned the operating equipment.

The Court: In the Block case there was part of the equipment which the court believed was clearly real property, it was affixed to the real property, and I so determined.

Mr. Weymann: That is correct.

The Court: But there was a good deal of personal property in the form of tools and loose equipment that had no connection whatsoever with the real property.

Now, that was my view. Your view was that it all should have been valued as of September 28, 1942.

Mr. Weymann: That is correct, as a single operating unit.

The Court: But the court was of the view that part of it was personal property, and that that part which was definitely personal property should have been valued as of January — no, it seemed to me it was November.

Mr. Weymann: October 4th, that was the date of the adoption of the resolution authorizing the amendment of the complaint.

The Court: Yes, as of October 4, 1944.

Mr. Weymann: And that is the date your Honor fixed.

The Court: Does the same situation obtain here? That is, is part of this property that is affixed to the well, as the court held it was in the other case, and part of it personal property that the court believed was entirely personal property in a legal sense and had no connection whatsoever with the real property; is that the situation here?

Mr. Weymann: I believe that is the situation. Part of the property here is casing in the well, part of it is [75] pumping equipment, liners, tubing, sucker rods, and the pump and a derrick, I believe, is included.

The Court: The derricks, of course, were affixed to the land.

Mr. Weymann: That is correct.

The Court: I am speaking about the cables and the tools and various things that had no connection what-

soever with the real property. Is there the same thing here?

Mr. Weymann: There may well be, and I am not in a position to say that there are not some —

The Court: You are appealing on that point chiefly, aren't you?

Mr. Weymann: That is correct.

The Court: What is the status of your appeal?

Mr. Weymann: The opening brief is due on July 20th.

The Court: It hasn't progressed very far.

Mr. Weymann: No, it hasn't progressed very far.

The Court: Thank you for informing me.

Go ahead, Mr. McPherson.

Mr. McPherson: Confining myself simply to the points that Mr. Lieberman did not mention —

The Court: Yes, and mention them just as concisely as you can, because we are taking more time than anticipated. I think it is largely due to the court's interrogation, though.

Mr. McPherson: The one point that surprised me is the [76] contention of Mr. Bodkin, and which seems to me is completely and effectively disposed of by both the law which regulates and confines the jurisdiction of this and all other courts, as well as the courts of California in actions where the sovereign is involved, when he admits, as he did yesterday, that the government is the real party in interest and he simply filed these suits in the State Court for convenience against an admitted agent.

Now, let's see how he did that and then I am going to leave that equity to your Honor's own mind, which I know is as clear on that point as any I have ever heard discussed, the question of good faith.

Bear in mind that in order to get into this position Mr. Bodkin and his client have come here and time and time again, as many as fifty, perhaps, have stated either in open court under oath or by way of pleadings that the government seized his property. In the State Court the very essence of his jurisdiction depends on the equally forceful, but I think untrue, and admittedly untrue in this court, allegation that the Union Oil Company seized his property.

Now, our interest in the protection of the Union Oil Company is not beyond, more, or any different than the obligation of the contract which the government has with the Union Oil Company to operate this property, a copy of which is before you. Our interest in appealing to you for injunction [77] against the persecution of that agent is to prevent them doing indirectly what they could not do directly, and that is to make the government answerable in the courts of California for this wrong, if it were a wrong.

Now, the Ninth Circuit has disposed of an equally effective point, which it seems to me controls this decision; we argued it to Judge Palmer; in the Wells Fargo case, which was cited by the Ninth Circuit in the Western Fruit Growers case, which originated in this very court. The Western Fruit Growers case was an application for an injunction to restrain interference with enforcement of one of the government department's regulations by action in the State Court to prevent them from carrying it into effect. Judge McCormick signed the original restraining order; Judge Yankwich signed the final decree. The appeal was to the Ninth Circuit, and they hold stronger than any other circuit in this country that the identity of the subject-matter, the cause of action which would be restrained in the Federal Courts

is simply subject-matter and not res. So we find ourselves in the position where the application is for an injunction in the circuit that has gone farther than any other circuit in the country in preserving the federal jurisdiction of actions involving the Federal Government.

The answer is a simple one going back to *Gibbons v. U. S.* in 8 Wallace, when the Tucker Act was brand new, and when the [78] court was asked to change the rule and give effect to a cause of action arising ex delicto under the Fifth Amendment, as though upon an implied promise, the court at great length pointed out that the Federal Government must never be presumed not to answer for its debts in any court. The jurisdiction of no court can be extended by the harshness, if there be harshness, in the result obtaining in employing the uniform rule of sovereign immunity to suit.

If that is the rule, and it has been since 8 Wallace, why should it be relaxed for convenience of counsel? Why should it be relaxed on the whim of counsel?

The mere statement to you is that he does not intend to bring the cases on for trial, when if you will think about it for a minute you will see what he is doing is this: He is seeking to recovery under the guise of an action ex delicto against an agent of the government of the United States for things done in the oil cases in the operation of property after the government has come into possession under an order of this court, and as to the claim and delivery action, as he contends, because of the wrongful seizure. That, I am certain, your Honor will not permit.

Mr. Bodkin: May I say a couple of words, if your Honor please?

The Court: The government has a right to close, so make it very concise, Mr. Bodkin, because Mr. McPherson and Mr. [79] Lieberman will have a right to reply to any new matter.

Mr. Bodkin: Yes, I will make it very concise.

I hope your Honor will read the cases that have been cited, and not take the construction placed upon them by Mr. McPherson. If your Honor will do that, I will be very happy.

The Court: You mean the cases cited by Judge Palmer?

Mr. Bodkin: Yes, by Judge Palmer, and the cases cited by Mr. McPherson today.

The Court: The last cases he referred to?

Mr. Bodkin: Yes. The jurisdiction of the court that has the power to determine. If your Honor has held, and I was not aware that you have held in the Block case, because I was not present at the trial, that a certain type of property was in fact clearly and truly personal property, and that it was unlawfully taken on September 28th, and that the lawful taking could not go beyond October 4, 1943 —

The Court: Read that statement, please, Mr. Goldstein.

(The record was read.)

Mr. Bodkin: That is the time of the adoption of the resolution.

The Court: I think if you make it this way, that the court held that a certain part of the property was entirely personal property, and that the taking of the personal property was on October 4, 1944? [80]

Mr. Bodkin: '43, if your Honor please.

The Court: '42, yes.

Mr. Bodkin: Therefore, it being admitted that at least a part of the personal property we are suing for here today comes within that classification, this court — and I think the law is well established — can only compensate in a compensation suit for the lawful taking of property.

It would be a fine thing if the court, perhaps, could grant damages and do the things suggested by Mr. Lieberman, but the law is undoubtedly clear that they can only grant damages in a compensation suit for the value at the time it was lawfully taken.

So we have at least from September 28, 1942 until October, 1943, which was the first start of any attempt to condemn personal property as such, an unlawful taking and an unlawful withholding. That being the case, this court is without jurisdiction to grant us any relief in this action, and there cannot be a conflict between this court and the State Court, where the State Court is in a position to grant relief in that regard.

Now, the Western Fruit case that has been referred to involved crimes under the Federal Statutes, federal crimes; the Circuit Court held that the Federal Court has exclusive jurisdiction which, of course, is just common sense.

I don't intend to take any further time, if your Honor [81] please. We filed a rather comprehensive brief, two briefs here, and if your Honor will read those cases I am satisfied that he will deny the injunction.

I may say so far as the oil cases are concerned, they were filed for the purpose of preserving our rights in the event that your Honor should hold the entire proceedings were void, or in the event the case should be eventually dismissed.

As to the personal property, we filed those with the intention of trying them, and we have set them down for trial but have not attempted to set down the oil cases for trial at all.

The Court: Let me get that straight about those four cases now. Will you state it again? I think you have, probably.

Mr. Bodkin: The two cases involving personal property, equipment, and matters of that kind, were filed within three years of September 28, 1942, and those are the cases which we are seeking to try and we have set for trial, and they are set for trial in September, 1946.

The Court: What about the other two cases?

Mr. Bodkin: The other two cases, the oil cases were filed later, and were filed for the purpose of having an action on file so that if your Honor should hold that the entire —

The Court: You have stated that. What about this, Mr. [82] Bodkin? Would you have any objection to the abatement of the trial of the two oil cases by an injunctive order of this court?

Mr. Bodkin: The two oil cases?

The Court: That is the real property cases. As I understand it, two relate to personal property and two relate to real property.

Mr. Bodkin: So far as the oil is concerned, we will stipulate now that we will not try those cases until this present case is determined finally, so far as the two oil cases, which we have not attempted to set for trial.

I don't like to have an injunction granted against us, but we will stipulate here in court that we will not —

The Court: I just wanted to get your position.

Mr. Bodkin: So far as I am concerned, we don't intend to try those cases, because if, as a matter of fact,

the court did have jurisdiction and the case is eventually prosecuted to final judgment on the real estate, then our oil cases cannot be successfully prosecuted.

The Court: Let me ask you one further question. You, I think, have an understanding of what the ruling of the court was in the trial of the Block case; that is, certain of the equipment there was so attached to the well that the court is of the opinion that it was real property, and certain of it was so clearly loose and independent from any possible fixture [83] to the real property that the court was of the view that it was without question personal property; that the date of one was October 4, 1943, and the date of the other was September 28, 1942. Assuming that the court's position would be upheld by the Appellate Courts, what then would you say would be the effect of that decision upon the similar property here?

Mr. Bodkin: If that were upheld that as to certain pipes and things in the well, and if your Honor held on the derrick, why, naturally that would be a determination that that was real property.

The Court: I understand that, but I am thinking of the effect that would have on the two cases in the State Court.

Mr. Bodkin: The result would be that as to certain of the personal property, we could recover judgment as to those.

Mr. McPherson: I can't hear you.

Mr. Bodkin: I say as to the property which was clearly personal property under the court's decision in the Block case, naturally we could only recover our damages for that.

The Court: And if you failed to recover it as of the date of September 28, there would be an injury to your clients?

Mr. Bodkin: Yes.

The Court: Now, Mr. McPherson, let me ask you what is your view of that same situation? We will put it a little differently. Suppose the Court of Appeals reverses the [84] District Court on that and goes along with your contention.

Mr. McPherson: I don't think, your Honor, if I understand your contention correctly, that it makes the least bit of difference in the world. Your question here is one of jurisdiction to make the determination, and that is exclusively in the Federal Court; whether it be real property or personal property is of no moment.

The Court: Read that answer.

(The statement was read.)

The Court: The court is considering now injunction. This court is asked to enjoin the prosecution of certain cases, and the very basis of injunction is equity.

Mr. McPherson: Yes, your Honor.

The Court: Now, what would be the effect from an equitable viewpoint, that is, as to the alleged injury that will result to the plaintiffs in the State Court with regard to the personal property which may be held to be entirely personal property, as I have thought it was?

Mr. McPherson: Maybe I don't—

The Court: Say the Court of Appeals sustains the District Court in this appeal in the Block case. If it does, then it will say that the personal property which is clearly personal property should be evaluated as of October 4, 1943. There is a lapse of a little more than a year there during which time Mr. Bodkin contends

that his clients have been injured by [85] reason of the deterioration of the property.

Is the court's question clear to you now?

Mr. McPherson: I think so, your Honor. Let me state it so I will be certain I am answering the question. You wish me to express an opinion on the propriety of an injunction in the event the Circuit Court should uphold your finding that the effective date of taking of personal property was October 4, 1943?

The Court: I think that is a very concise statement.

Mr. McPherson: Then I would say that it would have no bearing on the impropriety of the issuance of the injunction now. It would have a bearing on the propriety of restraining further prosecution of that suit when and if this owner was denied compensation in this case for the taking of his property evaluated as of whatever date your Honor fixes with damages for the possession of the government for the preceding period. The question of damages for possession of Block's property for the period in advance of October, 1943, was not in your case, as I remember it. In other words, I don't see that the Block appeal controls your decision here.

The Court: It might not control, but it might have some bearing upon the possible injury to the clients of Mr. Bodkin if they are deprived of the right to proceed in the State Court.

You think they would have no possible injury until after [86] the court shall have determined here whether or not the valuation should be made as of September 28th or, say, October 4, 1943?

Mr. McPherson: That is correct, until your Honor has fixed the liability and has failed to comprehend the effective date of taking and the intervention possession,

Mr. Lieberman: And has determined which is personal and which is real.

The Court: It is very unfortunate for us to try to be too sure of anything in law matters, particularly when it comes to fixtures. I think a definition I heard read of fixtures once wasn't such a bad one, either. Some judge defined "fixtures" as anything about which there was any question. If there was any question as to whether it was a fixture or not, then it was a fixture.

I wouldn't be too sure about any of these matters until after the Supreme Court has ruled on them, but what I had in mind was this: My view at the time was that certain of this well equipment was personal property and certain of it was real property, because it was affixed to the realty. Mr. Weymann's position was that it was a unit and used in conjunction with the operation of the well, and, therefore, it was all real property and came within the terms of the order of taking. I didn't agree with him, and that matter is now on appeal. I don't believe I could make any different determination if the matter were presented to me at a later time, which it probably will be. I know right at the moment I wouldn't make any different determination, because Mr. Weymann very forcefully and at length argued his position, his contention. So unless something would come up to change my mind, I think that the ruling of the court would have to be the same on that particular point. I was thinking that it might be of help if we didn't have to determine this question until after the Court of Appeals had determined that question in the

Block case. I don't want to hold it up, but also, it seems to me, that the defendants here certainly couldn't suffer any more if the court should hold it up until after the decision in that case than they could or would suffer if the court granted the motion for the injunction.

That is just a thought that occurred to me.

The Court: Could you gentlemen arrange to have the transcript written up of these proceedings?

Mr. Bodkin: We would join with you in having it written up.

Mr. Weymann: We will telephone for authority, and I don't think there is any question about getting it.

The Court: It is going to be some time before I am going to be able to get to this. I take over the criminal calendar in July. I don't know just how much time I will be able to give for the purpose of determining this motion. Injunction [88] matters, of course, ordinarily should take precedence over most matters, but criminal matters take precedence over everything.

Mr. Clifton, what were these other matters on the calendar?

The Clerk: Two motions involving the Ttitle Insurance and Trust Company's answers.

The Court: Mr. Weymann — this is not on the record.

(Discussion had off the record.)

The Court: Let's continue those matters until the 24th of June at 2:00 o'clock.

Upon the presentation of the transcript the matter is ordered submitted.

[Endorsed]: Filed Aug. 21, 1947. [89]

[Endorsed]: No. 11768. United States Circuit Court of Appeals for the Ninth Circuit. Treasure Company, a corporation, and Samarkand Oil Company, a corporation, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed, October 23, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the Circuit Court of Appeals of the United States
in and for the Ninth Circuit

No. 11768

TREASURE COMPANY, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

POINTS TO BE RELIED UPON BY APPELLANTS, TREASURE COMPANY, A CORPORATION, AND SAMARKAND OIL COMPANY, A CORPORATION, IN APPEAL FROM ORDER OF AUGUST 4, 1947; AND DESIGNATION OF RECORD.

The defendants and appellants Treasure Company, a corporation, and Samarkand Oil Company, a corporation, respectfully submit the following Statement of Points to be relied upon by them in their appeal from that certain Order of the District Court of the United States, in and for the Southern District of California, Central Division, made and entered in case numbered 2454-B, Civil, in said Court, in the above entitled action, by the Honorable Campbell E. Beaumont, Judge presiding there, on the 4th day of August, 1947, which said Order refused to dissolve and vacate the interlocutory injunction theretofore granted in said proceedings by said Court by its Order entered in said proceedings on January 7, 1947, and modified by an Order of said Court entered in said proceedings May 22, 1947; together with designation of the portions

of the record in this appeal which said defendants believe necessary for the consideration thereof, as follows:

I.

The following is a chronological statement of events leading up to this appeal:

(a) On September 28, 1942, the United States of America commenced an action for a condemnation of certain land, a part of which was subject to a leasehold interest in favor of these appellants by virtue of certain oil well leases.

(b) Neither said Complaint in Condemnation, nor the Order for immediate possession of land made September 28, 1942, nor the Declaration of Taking of Land made October 26, 1942, nor the Decree on Declaration of Taking of Land made October 26, 1942, made any reference whatsoever to any personal property or to anything but land.

(c) On September 27, 1945, these appellants filed actions numbered 505,967 and 505,968, respectively, in the Superior Court of the State of California, in and for the County of Los Angeles, to recover possession or the value of certain personal property belonging to these appellants and which was situated on the portion of the land sought to be condemned, which was subject to the said oil leases under which these appellants were lessees. Said personal property was wrongfully taken and detained from September 28, 1942, until the filing of the Amended Complaint on January 12, 1944, by Union Oil Company of California, a corporation, the sole defendant in said State Court actions. The petition for injunction alleged it was taken by the United States Marshall, but the record shows that the United States Marshall, purporting to act for the

United States Government, the plaintiff in said condemnation action, but without any actual authorization by plaintiff herein or any of its agencies, or by any order of any Court, unlawfully took possession of said personal property and delivered it to Union Oil Company of California, a corporation, who refused to deliver it to its owner upon demand.

(d) The said United States District Court acquired no jurisdiction with respect to said personal property until January 12, 1944, when a Supplemental Complaint, designated an Amended Complaint, was filed, by which plaintiff therein sought to condemn said personal property, which had been unlawfully taken and detained by Union Oil Company of California, a corporation, since September 28, 1942.

(e) During the period between September 28, 1942, and January 12, 1944, said personal property depreciated substantially in value and during said period there appellants were deprived of its use.

(f) On January 7, 1947, said District Court by an Order then made and entered restrained these appellants from proceeding further with said State Court proceedings against Union Oil Company of California, a corporation, which had not reached trial or judgment.

(g) On May 22, 1947, said Order of January 7, 1947, was by stipulation modified by said District Court, so as to make said injunction temporary, rather than final.

II.

The United States District Court has jurisdiction to dissolve an injunction if the Court is convinced that it was improvidently granted in the first instance, though there

has been no change in circumstances since the injunction was granted.

III.

An order refusing to dissolve an injunction is appealable either under 28 U. S. C. A.-227, or under Section 963 of the Code of Civil Procedure of the State of California.

IV.

An order of a District Court granting or vacating, or refusing to vacate, an injunction, may be reversed if the Court abuses its discretion in so doing, or it appears that there has been a disregard for established principles of law.

V.

The United States District Court abused its discretion and disregarded established principles of law in refusing to dissolve its injunction previously given, because by such refusal it denied to these appellants all recourse for the wrongful taking of said appellants' personal property on September 28, 1942, its detention thereafter, its subsequent deterioration, and for the value of its use from September 28, 1942, until January 12, 1944, for the following reasons:

(a) The machinery and equipment described in the State Court actions being personal property as between the respondent government and these appellants, the District Court acquired no jurisdiction over the personal property described in said State Court actions until the filing

of the Amended Complaint on January 12, 1944, by which a new cause of action was stated by which it was first sought to condemn said personal property, and therefore, no award can be made to these appellants in the condemnation action for the use and deterioration in value of the personal property between the filing of the original Complaint on September 28, 1942, and the filing of pleading designated an Amended Complaint, which was in fact a Supplemental Complaint, on January 12, 1944.

(b) Although the so called Amended Complaint in the condemnation action was filed January 12, 1944, whereby it was sought to condemn the personal property described in the State Court actions, the commencement of the State Court actions on September 27, 1945, and the maintenance thereof do not constitute a violation of the rule that the Court which first acquires jurisdiction in an action in rem is entitled to retain exclusive jurisdiction of such action, because the State Court actions in so far as they seek to recover the value of the loss of the use and of the depreciation in value of such personal property are actions in personam rather than actions in rem, and the District Court is without jurisdiction to grant relief for the unlawful taking and detention of such personal property.

(c) The conclusions of the Court and its decisions on the Motion for Injunction rendered herein by the Honorable Paul J. McCormick of the United States District Court on June 12, 1945, and the Findings of Fact, Conclusions of Law and Judgment rendered by Judge William J. Palmer on October 24, 1945 in State Court actions

489318 and 489319, are res adjudicata in this action, in so far as they determine that the personal property of appellants taken on September 28, 1942, was wrongfully taken and that such wrongful taking has never been ratified by the respondent government or any agency thereof.

(d) The determination by the Circuit Court of Appeals in this condemnation proceeding, in *United States vs. Samuel Block*, 160 F. 2d 604, that the award made for the taking of personal property in connection with condemnation proceedings must be predicated upon the value of the property when it is first lawfully taken pursuant to such proceedings, is the law of the case.

(e) The prosecution of the State Court actions will in no wise interfere with the jurisdiction of the District Court to proceed to trial and to make an award to these appellants for the value of their leasehold interest in the real property and the value of their personal property at the time of the filing of the Amended Complaint in the condemnation action on January 12, 1944.

(f) Defendant Treasure Company having the right to remove improvements put on the land covered by its lease, it was not entitled to recover compensation for such improvements in this condemnation action, until the Supplemental or Amended Complaint was filed.

(g) The provisions of Section 265 of the Federal Judicial Code renders the granting of the injunction in this case erroneous, an abuse of discretion, and a violation of established principles of law, and therefore, said Order refusing to vacate said injunction should be reversed.

DESIGNATION OF RECORD

Appellants hereby designate the entire record as certified by the Clerk of the United States District Court in this appeal, to be printed, together with this Designation, and to be considered in connection with the above Points.

Respectfully submitted,

BODKIN, BRESLIN & LUDDY

By Henry G. Bodkin

Attorneys for Appellants, Treasure Company, a corporation, and Samarkand Oil Company, a corporation

Dated: October 23, 1947.

[Endorsed]: Filed Oct. 24, 1947. Paul P. O'Brien,
Clerk.

No. 11768.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

TREASURE COMPANY, a corporation, and SAMARKAND OIL
COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

FILE

FEB 26 1946

PAID BY DEPOSIT

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No. 11768.
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

TREASURE COMPANY, a corporation, and SAMARKAND OIL
COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

I.

Jurisdiction.

DISTRICT COURT.

The action in which the proceedings culminating in the order appealed from arose, was an action by the United States to condemn land in Los Angeles County, State of California, under authority of Section 5d(5) of the Reconstruction Finance Corporation Act (15 U. S. C. 601-617) as amended by the Act of Congress approved March 27, 1942 (Public Law 507, 77th Congress), and Executive Order 9217, issued by the President of the United States on August 7, 1942, which Acts and Executive Order authorized the Reconstruction Finance Corporation to acquire and dispose of property deemed necessary for military, naval and other war purposes.

UNITED STATES CIRCUIT^c COURT OF APPEALS.

An order refusing to dissolve an injunction is appealable either under Section 227 of Title 28, U. S. C., or under Section 963 of the Code of Civil Procedure of the State of California.

II.

Statement of Case.

This is an appeal from an order made by Honorable C. E. Beaumont, refusing to dissolve and vacate an interlocutory injunction, which enjoined appellants from proceeding with the trial of certain actions in the Superior Court of Los Angeles County against Union Oil Company, a corporation, to recover certain personal property or damages for its taking and withholding.

On September 28, 1942, appellee, acting on behalf of Reconstruction Finance Corporation, a federal corporation, acting in behalf of Defense Plant Corporation, a federal corporation, filed action No. 2454-B seeking to condemn certain pieces and parcels of land situate in the City of Los Angeles, particularly described in the complaint. [Tr. p. 7, fol. 5.] That said land was sought to be condemned for "the establishment of a reservoir for the storing and conservation of natural gas." [Tr. p. 5, fol. 4.]

The action was commenced in accordance with subparagraph (5) of Section 5d of the Reconstruction Finance Corporation Act (Act. U. S. C. 601-617) as amended by Act of Congress approved March 27, 1942 (Public Law 507, 77th Congress) and Executive Order No. 9217. Public Law 507 is generally known as the Second War Powers Act and is in so far as applicable, as follows:

"Sec. 2. *The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real*

property, * * * together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, * * * *Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act (this section and section 171 of Title 50), notwithstanding any other law. * * ** (Italics ours.)

Executive Order 9217 is as follows:

“By virtue of and pursuant to the authority vested in me by Title II of the Second War Powers Act, 1942, approved March 27, 1942 (Public Law 507, 77th Congress) (section 171 note and section 632 of this Appendix), the *Reconstruction Finance Corporation is hereby authorized to exercise the authority contained in the said Title II of the Second War Powers Act, 1942 (section 171, note and section 632 of this Appendix), to acquire, use, and dispose of any real property, temporary use thereof, or other interest therein, together with any personal property located thereon, or used therewith, that the Corporation shall deem necessary for military, naval or other war purposes.*” (Italics ours.)

This is the law which gave Reconstruction Finance Corporation and the United States Government the right to act, and it is under such law that we must determine the legality of their acts.

On September 18, 1942, Reconstruction Finance Corporation, pursuant to the authority granted to it by the aforesaid executive order, adopted a resolution which provided for the taking of land only. (Tr. p. 220, fol. 31.] The resolution is attached to the original complaint,

is set forth in full at Tr. p. 72, and its adoption is admitted. It directed the Attorney General to file suit to condemn said land, and pursuant thereto suit to condemn land was filed September 28, 1942. Upon filing of the suit, there was filed a declaration of taking of land [Tr. pp. 20 and 21] and an order of taking was made by Judge Beaumont, which likewise only authorized the taking of land. On September 28, 1942, Judge Beaumont signed an order for immediate possession which authorized taking possession of land only. [Tr. p. 14, fol 12, to p. 19, fol. 16.] This order directed the United States Marshall to post a notice of the taking of such land.

The Union Oil Company, a corporation, was designated agent of Defense Plant Corporation to take possession of such land. [Tr. p. 67.] Notwithstanding the fact that the resolution of taking and the order for immediate possession only referred to land, Defense Plant Corporation directed its agent, Union Oil Company, to take possession of all personal property on the land and to make an inventory thereof. [Tr. p. 67, par. II.] Pursuant thereto, Union Oil Company entered into possession of the real and personal property of appellants and took an inventory of the personal property. This inventory is headed:

“INVENTORY OF THE PROPERTY AND EQUIPMENT REFERRED TO IN PARAGRAPHS XIII, XIV AND XV OF THE FIRST AMENDED COMPLAINT FILED HEREIN, AND WHICH IS TO BE ACQUIRED BY CONDEMNATION IN THE ABOVE ENTITLED ACTION. (80)”

In such inventory appears a list of items headed “Items Deleted from Original Inventory as Indicated as Not Being Needed in Playa Del Rey Project” [Tr. pp. 97 to 100, incl.], in reference to appellant Samarkand’s prop-

erty and as to Treasure Company's property at transcript pages 108 to 118 inclusive.

After Defense Plant Corporation and its agent, Union Oil Company, were unlawfully in possession of the personal property of appellants since September 28, 1942, in spite of appellants' protests, in the month of October, 1943, Reconstruction Finance Corporation passed an amendatory resolution for the taking of defendants' personal property, but by such action Reconstruction Finance Corporation did not expressly ratify the unlawful taking, even if it had such powers. It merely resolved:

“Resolved herewith, That it is necessary and advantageous in carrying out the authority vested in Defense Plant Corporation to acquire by condemnation the machinery and equipment described in said Exhibit “C.” [Tr. p. 81.]

This Exhibit “C” contained a list of the personal property of appellants, which had theretofor been unlawfully taken, under the headings hereinbefore set forth. The foregoing resolution speaks of Defense Plant Corporation's authority to acquire property by condemnation. In so far as the Second War Powers Act and resolutions pursuant thereto are concerned, and federal law generally, it is sufficient to say that Defense Plant Corporation was never given authority to take property for war purposes.

In November, 1943, appellants filed separate actions against Union Oil Company in the Los Angeles Superior Court to recover certain of the personal property unlawfully taken and withheld. Defense Plant Corporation intervened in said actions.

On January 12, 1944, an amended complaint in condemnation was filed in Action 2454-B in which it was

sought to condemn all of appellants' personal property, both that deemed necessary and that not deemed necessary for the project, by Union Oil Company, its operating agent. [Tr. pp. 37 to 46, incl.] Appellants filed their answers thereto. [Tr. pp. 47 to 51, incl.]

The answers said in part:

"That said personal property so belonging to Samarkand Oil Company, a corporation, was on September 28, 1942 unlawfully taken by the United States of America, Reconstruction Finance Corporation, a Federal Corporation, and Defense Plant Corporation, a Federal Corporation, and their agents, and that said material and supplies, personal property and improvements were on the 28th day of September, 1942, of the reasonable value of \$261,104.14, and the United States of America, Reconstruction Finance Corporation, a Federal Corporation and Defense Plant Corporation, a Federal Corporation, and their agents, at all times since said 28th day of September, 1942, so unlawfully retain possession of said property."

The agents referred to were Union Oil Company and its employees.

Defense Plant Corporation sought to abate the State Court actions against Union Oil Company filed November 15, 1943, in which it intervened, but was unsuccessful in so doing. [Tr. pp. 155 to 161, incl.] The opinion of Judge Palmer is carefully considered and he denied the motion to abate.

Thereupon, appellee, by motion in action No. 2454-B, sought to enjoin appellants herein from proceeding with the trial of said actions in the State Court. During Judge

Beaumont's absence, to whom the case was regularly assigned, Judge McCormick heard the motion.

After lengthy argument, Judge McCormick denied it *in toto*. A copy of his well considered decision will be found at transcript pages 52 to 63, inclusive.

As we contend that Judge McCormick's decision is the law of the case, it is necessary that the decision be carefully studied.

Judge McCormick said in part at page 53:

"Notwithstanding the limitations of the order for possession, the seizure made by the Government on September 28, 1942, included personal property, as well as real property, of the Treasure Company and Samarkand Oil Company, the two defendants in this action that are resisting the instant motion for injunction.

"The purpose of the acquisition of the subject properties was to provide gas storage facilities for defense needs on the site of depleted oil wells. However, the record discloses that personal property not affixed to the realty was seized by the agents of the Government and that, also, a producing oil well is now in the hands of the Government agents."

Again, at page 61, transcript, Judge McCormick said:

"The fair preponderance of the evidence before us establishes, we think, that the present claim that it was the intention from the inception of the project to acquire the personalty is an afterthought conceived to avoid possible consequences of the seizure of September 28, 1942."

An appeal was taken by the Government from Judge McCormick's decision but was later dismissed. Thereupon, the State Court actions proceeded to trial. Both Reconstruction Finance Corporation and Union Oil Company were

parties to such action, the first as intervenor, the latter as party defendant. Judgment was rendered for appellants herein in both actions. The written decision of Judge Palmer will be found at transcript pages 162 to 170, inclusive. Findings of Fact and Conclusions of Law and Judgment in the case of appellant Treasure Company will be found at transcript pages 135 to 151, inclusive. A similar Finding and Judgment was entered in appellant Samarkand's case.

These judgments have long since become final.

Defense Plant Corporation was a party to the motion before Judge McCormick and to the cases tried before Judge Palmer.

Defense Plant Corporation is also a party to the present proceeding.

The law laid down by Judge McCormick and Judge Palmer is binding and conclusive on appellee herein.

After the determination of said State actions, appellants filed two additional State actions each, one of such actions on behalf of each appellant against Union Oil Company, a corporation, being to recover personal property consisting of oil equipment not covered by the original actions or its value and damages for its withholding. Service was made upon Union Oil Company and it filed its answers to such suits.

Thereafter, appellee served and filed a petition for injunction against appellants in the United States District Court seeking to enjoin appellants from proceeding with the trial of said State actions against Union Oil Company. [Tr. pp. 66 to 118, incl.] At the same time, appellee caused to be served and filed a notice of motion for injunction. [Tr. pp. 119 to 121, incl.] Appellants filed

their answer thereto, which will be found at transcript pages 121 to 151, inclusive.

The motion came on for hearing on June 10, 1946. The record of this hearing will be found at transcript pages 197 to 266, inclusive.

During the proceedings, counsel for appellants informed the Court that there were two sets of actions pending in the State Court, one involving the taking of oil from the land of each appellant, and the other action involving personal property. That as to the two cases involving oil, it was not the intention of appellants to try such cases until after the determination of the condemnation suit. [Tr. p. 219.]

After submission and on January 27, 1947, a temporary injunction was issued by Judge Beaumont, enjoining and restraining appellants from proceeding with the trial of the two State actions involving personal property. Because of the statement of counsel that appellants did not intend to proceed with the cases involving the taking of oil, no order was made therein.

This order will be found at transcript pages 171 to 175, inclusive.

Thereafter, by stipulation, an order was made modifying the order of January 27, 1942, *nunc pro tunc*, to expressly provide that appellants are enjoined and restrained from proceeding further in said State Court actions involving personal property until the further order of the Court. This modifying order will be found at transcript pages 176 to 178.

Thereafter, appellants filed their written notices of motion to dissolve and vacate the interlocutory injunction granted January 27, 1947.

Said motion was made upon the ground that the order and decree was erroneously and improvidently made and granted and its continuance would work an unjust hardship upon appellants. Said motion was based upon the papers, files, and records in the condemnation suit, Reconstruction Finance Corporation resolution of September 18, 1942, original complaint in condemnation, order for immediate possession dated September 28, 1942, amendatory resolution of Reconstruction Finance Corporation of October 19, 1942, declaration of taking of October 26, 1942, amendatory resolution of Reconstruction Finance Corporation of October 4, 1943, first amended condemnation complaint, conclusions of law, and decision on injunction by Judge McCormick, and affidavit by G. de Bretteville. [Tr. pp. 179 to 185.]

This motion came on for hearing before Judge Beaumont and was resisted by counsel for appellee. The motion was denied. [Tr. p. 185.] This appeal was taken from such order so made. [Tr. p. 186.]

III.

Specification of Errors.

(1) The United States District Court erred in making said order of August 4, 1947, in that in making said order said Court abused its discretion and disregarded established principles of law in refusing to dissolve its injunction previously given, because by such refusal it denied to these appellants all recourse for the wrongful taking of said appellants' personal property on September 28, 1942, its detention thereafter, its subsequent deterioration, and for the value of its use from September 28, 1942, until January 12, 1944.

IV.
ARGUMENT.

Summary of Points Relied Upon.

(1) The United States District Court has jurisdiction to dissolve an injunction if the Court is convinced that it was improvidently granted in the first instance, though there has been no change in circumstances since the injunction was granted.

(2) An order refusing to dissolve an injunction is appealable either under 28 U. S. C. A. 227, or under Section 963 of the Code of Civil Procedure of the State of California.

(3) An order of a District Court granting or vacating, or refusing to vacate, an injunction, may be reversed if the Court abused its discretion in so doing, or it appears that there has been a disregard for established principles of law.

(4) The United States District Court abused its discretion and disregarded established principles of law in refusing to dissolve its injunction previously given, because by such refusal it denied to these appellants all recourse for the wrongful taking of said appellants' personal property on September 28, 1942, its detention thereafter, its subsequent deterioration, and for the value of its use from September 28, 1942, until January 12, 1944, for the following reasons:

(a) The machinery and equipment described in the State Court actions being personal property as between the respondent government and these appellants, the District Court acquired no jurisdiction over the personal property described in said State Court actions until the filing of the Amended Complaint on

January 12, 1944, by which a new cause of action was stated by which it was first sought to condemn said personal property, and therefore, no award can be made to these appellants in the condemnation action for the use and deterioration in value of the personal property between the filing of the original Complaint on September 28, 1942, and the filing of pleading designated an Amended Complaint, which was in fact a Supplemental Complaint, on January 12, 1944.

(b) Although the so-called Amended Complaint in the condemnation action was filed January 12, 1944, whereby it was sought to condemn the personal property described in the State Court actions, the commencement of the State Court actions on September 27, 1945, and the maintenance thereof do not constitute a violation of the rule that the Court which first acquires jurisdiction in an action *in rem* is entitled to retain exclusive jurisdiction of such action, because the State Court actions in so far as they seek to recover the value of the loss of the use and of the depreciation in value of such personal property are actions *in personam* rather than actions *in rem*, and the District Court is without jurisdiction to grant relief for the unlawful taking and detention of such personal property.

(c) The conclusions of the Court and its decisions on the Motion for Injunction rendered herein by the Honorable Paul J. McCormick of the United States District Court on June 12, 1945, and the Findings of Fact, Conclusions of Law and Judgment rendered by Judge William J. Palmer on October 24, 1945, in State Court actions 489318 and 489319, are *res ad-*

judicata in this action, in so far as they determine that the personal property of appellants taken on September 28, 1942, was wrongfully taken and that such wrongful taking has never been ratified by the respondent government or any agency thereof.

(d) The determination by the Circuit Court of Appeals in this condemnation proceeding, in *United States v. Samuel Block*, 160 F. (2d) 604, that the award made for the taking of personal property in connection with condemnation proceedings must be predicated upon the value of the property when it is first lawfully taken pursuant to such proceedings, is the law of the case.

(e) The prosecution of the State Court actions will in no wise interfere with the jurisdiction of the District Court to proceed to trial and to make an award to these appellants for the value of their leasehold interest in the real property and the value of their personal property at the time of the filing of the Amended Complaint in the condemnation action on January 12, 1944.

(f) Defendant Treasure Company having the right to remove improvements put on the land covered by its lease, it was not entitled to recover compensation for such improvements in this condemnation action, until the Supplemental or Amended Complaint was filed.

(g) The provisions of Section 265 of the Federal Judicial Code renders the granting of the injunction in this case erroneous, an abuse of discretion, and a violation of established principles of law, and therefore, said order refusing to vacate said injunction should be reversed.

ARGUMENT UNDER ABOVE POINTS.

- (1) The United States District Court Has Jurisdiction to Dissolve an Injunction if the Court Is Convinced That It Was Improvidently Granted in the First Instance, Though There Has Been No Change in Circumstances Since the Injunction Was Granted.

In the case of *American Ins. Co. v. Scheufler*, 129 F. (2d) 143, a preliminary injunction was procured by certain insurance companies restraining the attorney general from interfering with the collection of a proposed increase in the insurance rates of the plaintiff companies before a judicial determination was had of the plaintiffs' rights to collect such increased rates. By the terms of the injunction the plaintiffs were permitted to collect the increased rates pending the trial on condition that such sums be paid into court. By the final judgment it was determined that all of the impounded funds should be returned to the policy holders in proportion to their respective contributions to the funds on deposit with the court and the injunction was thereupon dissolved. The court in holding that the injunction went further than merely preserving the *status quo* in that it permitted the taking of the increased rates from the policy holders and transferring them to the custody of the court, said at page 147:

"They had originally been collected from the policyholders, not by reason of any legal rate schedule, but by virtue of injunctions which were entered permitting the collection of an increased premium rate on condition that the amount of the increase be deposited in court to await final hearing. It is worthy of note that these interlocutory injunctions went further than merely preserving the *status quo* until final hearing. They in effect permitted taking this premium

money from one party to the suit and transferring it to the custodian of the court. This conditional relief was granted in the discretion of the court. There was no right in the insurance companies to collect this increase in premium. Its collection *pendente lite* was not essential to preserve the *status quo* of the matter in controversy, but the injunctions rather disturbed that status. The suits might well have been prosecuted without the granting of the interlocutory injunctions. Having granted these injunctions, the court had a right to modify or dissolve them. The plaintiffs acquired no perpetual or vested right in the remedy, but the injunctive orders were ambulatory in character, going forward with the progress of the litigation."

So in the present case neither the UNITED STATES MARSHAL nor Union Oil Company had any legal right to take the personal property of these defendants prior to January 12, 1944, the date of the filing of the amended complaint, and hence the District Court could not compensate these appellants for the depreciation or loss of appellants' personal property occurring between September 28, 1942, and January 12, 1944.

Therefore the injunction restraining the prosecution of the State Court Actions Nos. 505-967 and 505-968 could not operate to maintain the *status quo* but rather disturbed it in that it takes from these appellants the right to prosecute the State Court actions for the recovery of the possession of their personal property thus unlawfully taken by the UNITED STATES MARSHAL and Union Oil Company, or the value of such property, the respondent herein not being obligated to respond in damages in respect to the loss and deterioration of such personal property between September 28, 1942, and January 12, 1944.

In *Westerly Waterworks v. Town of Westerly*, 77 Fed. 783, plaintiff brought an action to restrain the defendant Town from proceeding with the construction of a municipal water works after the plaintiff had expended considerable money in erecting the waterworks pursuant to a contract between plaintiff and defendant whereby the plaintiff had been granted the exclusive right to use the highways of the defendant Town for the installation of plaintiff's water mains for the purpose of supplying the inhabitants of the Town with water. The Circuit Court in pointing out that the motion to dissolve an injunction is not equivalent to a motion for a rehearing of the application for the injunction, said at page 784:

"The first objection is to the form of these motions. Whatever may be the precise wording of the motions, they were intended to be, and should be treated as, motions to dissolve a preliminary injunction, and not motions for a rehearing, as that term is generally understood."

Furthermore, the court in holding that the order granting a temporary (or what under the California Code is designated as a preliminary) injunction is at all times subject to motion in the Federal Trial Court to be vacated or modified, said at pages 784-5:

"Interlocutory orders granting temporary injunctions pending a hearing on the merits are at all times subject to motion to vacate or modify. These orders are not governed by the rules which apply to rehearings, where the merits of a case have been decided upon proper proofs. The granting or refusing of such injunction is addressed to the sound discretion of the court, and is not a determination of the merits of the case, and cannot operate as such except by stipulation of both parties. According to the due

course of equity procedure, no hearing can be had on the merits, and no final decree entered, until after answer, replication, and proofs taken in the regular manner. The complainant in the present case seems to have proceeded upon the theory that the hearing before Judge Carpenter on motion for a preliminary injunction was in the nature of a final hearing, and should be treated as such, but this is clearly an error. If the court, in its decision, chose to enter upon a discussion of the merits of the case, that circumstance cannot in any way operate to change the real character of the order."

The objection to the setting of the motion for hearing was denied and the matter set down for hearing on its merits.

In *Indiana Quartered Oak Co. v. Federal Trade Com.*, 58 F. (2d) 182, the petitioner sought a writ of certiorari to review an order made by the defendant Federal Trade Commission restraining petitioner from using the name "Philippine Mahogany" in connection with the sale of certain wood imported from the Philippine Islands. The writ was denied by the Circuit Court of Appeals which had original and exclusive jurisdiction to review orders of the Federal Trade Commission. Thereafter the proceedings were had before the defendant Federal Trade Commission in which it was determined that the use of the designation "Philippine Mahogany" was proper in connection with the wood in question. The petitioner thereupon moved for an order vacating the injunction in question. The court in holding that a Federal Court in equity has inherent power to modify injunctive orders upon good cause shown and where equity demands such action, said at page 184:

"This court therefore has original jurisdiction in the matter of setting aside or modifying orders of the

Commission. With such original jurisdiction, it has the power to vacate its own order upon good cause shown and where equity demands such action. Such power is inherent in a court of equity where a modification of an injunctive order is sought."

It is significant that since the granting of the injunction on January 27, 1947, the UNITED STATES CIRCUIT COURT OF APPEALS for the Ninth Circuit rendered its opinion on March 22, 1947, in the case of *United States v. Samuel Block*, 160 F. (2d) 604. The appeal in the *Block* case was taken by the respondent herein from a decree made in the above entitled action awarding defendant Block compensation for the condemnation of his personal property and leasehold. By this decision the Circuit Court of Appeals held that the award in a condemnation action must be predicated on the value of the property at the time of the legal taking by the governmental agency. Personal property cannot be legally taken until a suit is filed to condemn personal property. This amendment was filed Jan. 12, 1944. Such holding by the Circuit Court of Appeals is now the law of the case as to the time at which the value must be fixed for the purpose of computing the award to be made for the taking of the personal property of the appellants TREASURE COMPANY and SAMARKAND OIL COMPANY, namely, not earlier than January 12, 1944.

The decision in the *Block* case would preclude this Court from allowing any compensation to these appellants on account of depreciation or loss of the said appellants' personal property between September 28, 1942, and January 12, 1944. It follows that the respondent's contention that the respondent herein is obligated to pay these appellants the reasonable value of the personal property

taken at the time of its tortious taking by the UNION OIL COMPANY on September 28, 1942, cannot be maintained. The appellants herein must have recourse to the actions in the State Court against the UNION OIL COMPANY in order to recover for the deterioration and loss of the personal property of these appellants between September 28, 1942, and January 12, 1944.

Under these circumstances the District Court should have dissolved the injunction of January 27, 1947, if it was convinced that the injunction should not have been granted in the first instance either by reason of misapprehension by the Court of the facts or the law applicable thereto regardless of whether there had been a change in the circumstances or not. As it is clear that the granting of the temporary injunction was contrary to law, the Court should have immediately vacated it upon motion.

(2) An Order Refusing to Dissolve an Injunction Is Appealable Either Under 28 U. S. C. A.-227, or Under Section 963 of the Code of Civil Procedure of the State of California.

40 U. S. C. A. 258 provides that the procedure in condemnation actions in the Federal Court shall be governed by the State law.

28 U. S. C. A., following 723(c), Rule 81-a-7 provides that the rules of civil procedure shall apply to appeals in proceedings for the condemnation of property under the power of eminent domain but are not otherwise applicable.

28 U. S. C. A. 227 provides that an appeal will lie from an order refusing to dissolve an injunction.

Section 963 of the Code of Civil Procedure of the State of California provides for an appeal from an order

refusing to dissolve an injunction. The pertinent portions of Section 963 of the Code of Civil Procedure read as follows:

“Section 963. (Cases in which appeal may be taken from Superior Court.) An appeal may be taken from a superior court in the following cases:

* * * * *

2. From an order granting a new trial or denying a motion for judgment notwithstanding the verdict, or granting or dissolving an injunction, or refusing to grant or dissolve an injunction, * * *”

It follows that if the order here in question is not appealable under 28 U. S. C. A. 227 because 40 U. S. C. A. 258 provides that the State law shall govern the procedure in Federal condemnation actions, the order here in question is appealable under Section 963 of Code of Civil Procedure.

In *Western Union Tel. Co. v. Louisville & N. R. Co.*, 201 Fed. 919, the court in holding that the only question presented on the appeal from the order restraining the prosecution of the condemnation proceeding was whether or not the trial District Court had rightfully exercised its discretion in granting the injunction, said at page 923:

“All further propositions of error relate alone to the issues tendered by the bill upon the merits of the controversy, which require hearing in conformity with the rules of equity for determination of all issues both of fact and law. The bill states, as we believe, entertainable cause for a hearing in equity, so that the appeal from the interlocutory order raises this single question: Was judicial discretion ex-

ceeded in staying the condemnation proceedings pending such hearing?

“Under the impressions of fact stated in the ruling of the trial court, founded on the preliminary affidavits, we believe the discretion was rightly exercised, and the order accordingly is affirmed.”

It would appear from this that the order refusing to vacate the preliminary injunction in the present case is an appealable order.

In *Puget Sound Power & Light Co. v. Asia*, 2 F. (2d) 485, the court said at page 489:

“ ‘An examination of the cases . . . will show that in every well-considered case, when an injunction restraining already instituted proceedings in a state court has been issued by a United States court, it was either based on a decree or judgment of the United States court which it was necessary and proper to enforce; or, if issued prior to judgment or decree, it was directed against a party who, after jurisdiction over him and the cause was fully vested, had resorted to proceedings in the state court necessarily conflicting with, if not ousting, the jurisdiction of the United States Court.’ ”

In any event if it be said that the order here in question is not appealable under 28 U. S. C. A. 227 because condemnation actions are governed by the state law, then the order under consideration is appealable under Section 963 of the Code of Civil Procedure of the State of California.

- (3) An Order of a District Court Granting or Vacating, or Refusing to Vacate, an Injunction, May Be Reversed if the Court Abused Its Discretion in So Doing, or It Appears That There Has Been a Disregard for Established Principles of Law.

In *Nisonoff v. Irving Trust Co.*, 68 F. (2d) 32, at page 33 of the decision, it is said:

“* * * (1) The record fairly shows that the defendant does what it is thus charged with doing. It seeks to justify its conduct in these respects by showing as to (a) and (b) that what it receives is lawfully allowed to it as expenses, and as to (c) that it acts by express authorization under Rule 30 of the District Court duly approved, and within the scope of General Order in Bankruptcy 46 promulgated by the Supreme Court (11 U. S. C. A. Section 53). As the facts are clear on the record, the plaintiff's right to an injunction *pendente lite* involves no element of discretion, but depends rather on her right to a permanent injunction. The element of time when the restraint shall become effective, if ever, is alone the distinguishing feature, and so, while the general rule is that the grant or refusal of a preliminary injunction falls within the exercise of a sound discretion by the trial court, that does not obtain where there has been a refusal or failure to follow clearly established principles of law properly applicable to facts not in dispute. *Winchester Repeating Arms Co. v. Olmsted* (C. C. A.), 203 F. 493. Compare *Union Tool Co. v. Wilson*, 259 U. S. 107, 112, 42 S. Ct. 427, 66 L. Ed. 848. Consequently the denial of the injunction *pendente lite* cannot be supported merely as a ruling within the proper bounds of the discretion of the trial court, but must be considered on the basis of legal right. * * *

(4) The United States District Court Abused Its Discretion and Disregarded Established Principles of Law in Refusing to Dissolve Its Injunction Previously Given, Because by Such Refusal It Denied to These Appellants All Recourse for the Wrongful Taking of Said Appellants' Personal Property on September 28, 1942, Its Detention Thereafter, Its Subsequent Deterioration, and for the Value of Its Use From September 28, 1942, Until January 12, 1944, for the Following Reasons:

(a) The Machinery and Equipment Described in the State Court Actions Being Personal Property as Between the Respondent Government and These Appellants, the District Court acquired No Jurisdiction Over the Personal Property Described in Said State Court Actions Until the Filing of the Amended Complaint on January 12, 1944, by Which a New Cause of Action Was Stated by Which It Was First Sought to Condemn Said Personal Property, and Therefore, No Award Can Be Made to These Appellants in the Condemnation Action for the Use and Deterioration in Value of the Personal Property Between the Filing of the Original Complaint on September 28, 1942, and the Filing of Pleading Designated an Amended Complaint, Which Was in Fact a Supplemental Complaint, on January 12, 1944.

(1) THE TAKING AND RETENTION OF THE PERSONAL PROPERTY OF APPELLANTS BY UNION OIL COMPANY OF CALIFORNIA WAS UNAUTHORIZED AND UNLAWFUL AND EVEN THOUGH SAID CORPORATION CLAIMED TO BE ACTING FOR APPELLEE, STILL A CAUSE OF ACTION IMMEDIATELY AROSE IN FAVOR OF APPELLANTS FOR SUCH UNLAWFUL TAKING AND RETENTION.

The undisputed facts establish that on or about September 28, 1942, appellants were the owners of certain

personal property consisting of oil equipment situated on land in the Del Rey Hills. On that day or the following, although the order of the Court only directed the taking of possession of land [Tr. pp. 14 to 19], Union Oil Company took possession of said personal property and retained it thereafter against the will of appellants. There could only be one justification for the taking and retention of such personal property and that would be a valid order so to do.

Because the taking was invalid and unlawful a cause of action immediately arose in favor of appellants and against those unlawfully taking and withholding the property.

In these cases appellants chose to sue Union Oil Company, a substantial California corporation. Once having had a cause of action for damages no one could take away such right, without appellants' consent.

In similar cases involving other personal property, taken under similar circumstances, certain actions were filed by appellants against UNION OIL COMPANY, which actions were filed November 15, 1943, before the amended condemnation action was filed on January 12, 1944.

As we have pointed out, when an injunction was sought in the United States District Court to enjoin the State Court from trying such actions, Judge McCormick, in refusing the injunction, questioned the good faith of the Government in filing the amendment. He indicated that the amendment was filed trying to get the Government and Union Oil Company out of a tight spot by reason of the unlawful taking of the property. And the Judge was well justified in his conclusion.

Bearing in mind that the purpose for which the land was taken was to establish a gas storage basin, it would take considerable imagination to say that the equipment described in the original state actions and the present actions could in good faith be said to be suitable for establishing a gas storage basin.

The question that must be decided now is whether a cause of action arose in favor of appellants when on or about September 28, 1942, Union Oil Company came into possession of and retained possession of the personal property involved in the present state actions against the will of appellants.

This personal property was owned by appellants. As the record shows, after a suit to condemn land was filed, the United States Marshal was given an order for the immediate possession of land. Union Oil Company, which claims to be the agent of Defense Plant Corporation, then took possession of the personal property. If such taking was lawful the record does not show it. In fact the undisputed record shows such taking and retention was unlawful.

Neither the United States of America, Reconstruction Finance Corporation or Defense Plant Corporation, or Union Oil Company, their agent, had a right to take or retain any part of the personal property, on September 28, 1942, or at any time before January 12, 1944, when it filed its amended complaint covering personal property.

The Second War Powers Act under which the condemnation was filed, until March 1942 had no provision

for the taking by condemnation of personal property. While elaborate proceedings are set up for the taking of immediate possession of real estate, by a deposit in Court of the estimated value of land taken, such procedure does not apply specifically to personal property.

The Second War Powers Act as amended in March 1942 provided in part as follows:

“Upon or after the filing of the condemnation petition immediate possession may be taken.”

This is the only authorization that is found in the Federal Statutes for the taking of possession of and retaining of personal property.

The only construction to be placed upon the Statute is that personal property may only be taken upon or after the filing of a condemnation suit to condemn personal property.

Undoubtedly the Government has a right to take immediate possession even though the provision as to depositing money, its value, in Court, is not specifically made to apply to personal property.

As the appellee and its agencies did not have a lawful right to take possession of appellant's personal property, Defense Plant Corporation's agent, Union Oil Company, had no right to take possession of and to hold such property.

Not having had the lawful right to either take or hold such personal property, appellants had an immediate cause of action against Union Oil Company for such unlawful taking and detention.

- (2) THE FILING OF THE AMENDED COMPLAINT IN THE CONDEMNATION ACTION SEEKING TO CONDEMN THE PERSONAL PROPERTY DID NOT CONSTITUTE A RATIFICATION OF THE ORIGINAL WRONGFUL TAKING BY THE INDIVIDUAL ACTING AS UNITED STATES MARSHAL NOR OF THE WRONGFUL RETENTION THEREOF BY THE UNION OIL COMPANY.

The amended complaint in so far as the personal property is concerned stated a new cause of action.

In *Adams v. Hoskins*, 144 Cal. 19, the court in holding that an amended complaint in a partition action including additional real property stated a new cause of action, in so far as such additional property is concerned, said at page 28:

“There is no foundation for the complaint that the decision of the trial court as to the statute of limitations was inconsistent and unfair as applied to the interests of the several parties to the suit. These appellants were parties to the original complaint and their lands were expressly included therein. The lands of the defendants whose title by adverse possession were upheld were expressly excluded from the original complaint and were brought in subsequently after the five-year statute of limitations had run in their favor.”

The amended complaint having stated a new cause of action in so far as the personal property is concerned whereby the personal property was for the first time effectually sought to be condemned, such amended complaint cannot be deemed to constitute a ratification of the prior wrongful taking of the personal property, but on the other hand, constituted initiation of a new proceeding which spoke only from the time of the filing of such

amendment on January 12, 1944. (See *McKnight v. Gelzean*, 29 Cal. App. (2d) 218.)

The filing of such amended complaint is the only fact relied upon in the answers of the Union Oil Company in the state cases to establish a ratification by the Government of the original wrongful taking. The filing of such amendment, however, does not have the effect of ratifying such original wrongful taking.

(3) THE MACHINERY AND EQUIPMENT REFERRED TO IN THE EXHIBIT ATTACHED TO THE AMENDED COMPLAINT [Tr. p. 84], IS PERSONAL PROPERTY AS BETWEEN THE APPELLEE AND THE APPELLANTS AND THEREFORE DID NOT BECOME SUBJECT TO CONDEMNATION IN THE ABOVE ENTITLED ACTION UNTIL THE FILING OF THE AMENDED COMPLAINT ON JANUARY 12, 1944.

In *People v. Church*, 57 Cal. App. (2d) Supp. 1032, the State brought an action to recover possession of a certain gas pump and automobile hoist. The State had theretofore filed an action to condemn certain land including that of which defendant Church was lessee and on which the pump and hoist were located. The plaintiff in the condemnation action had judgment in condemnation in respect to the real property and improvements. Before surrendering possession the defendant Church removed the pump which rested on a cement foundation and the hoist which consisted of a metal cylinder resting on a cement base which was sunk seven feet below the surface. The defendant had judgment from which the plaintiff appealed. In confirming the judgment the court said at pages 1048-9:

“As between private parties such as those bearing the relationship to each other of landlord and tenant, . . . their mutual intention as to whether an article is a fixture and part of the realty or is personalty is the controlling factor. As to third persons who are not parties to any such private agreement, however, the intent which controls is not a secret hidden intent but that manifested by the physical facts, giving due consideration to the status of the party by whom the articles have been installed.

See, to the same effect,

Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 216 Ind. 573, 25 N. E. (2d) 444, 447-8.

San Diego Trust and Savings Bank v. San Diego, 16 Cal. (2d) 142;

Whitlock Avenue v. City of New York, 16 N. E. (2d) 281;

Futrovsky v. United States, 66 F. (2d) 215, 216.

In *Potomac Electric Power Co. v. United States*, 85 F. (2d) 243, the court said at page 248:

“The rule applicable to so-called fixtures in buildings taken in federal condemnations is that, if they can be removed without substantial injury either to the real estate or to the fixtures, they remain personalty and need not be taken as part of the realty.”

In *United Natural Gas Co. v. James Bros. Lumber Co.*, 191 Atl. 12, an action was brought by the grantee of certain reserve oil rights to determine his rights thereto. The court in holding that the equipment and appliances

used in connection with the operation of the oil well constituted trade fixtures, said at page 14:

“The equipment and appliances used in connection with the wells are trade fixtures.”

In *Moore v. Carey*, 39 A. L. R. 1247 (Texas), the court said at page 1249:

“No part of the realty passed by that sale, except the oil and gas and the right to use the soil in discovering, developing, and bringing to the surface such oil and gas as might be found in the land in the period of the lease. If the casing of an oil well becomes a fixture,—a part of the soil,—when placed in the well, then every lessee who might put down a well on leased ground would lose title to the casing he puts into it. It would become the property of the lessor unless the contract specially provided otherwise. This ought not to be, and is not the law. Thornton’s Law of Oil & Gas, vol. 2, 3d ed. Sec. 653, says: ‘A lessee of land to bore for oil, who does not find any oil, has a right to remove not only the machinery used in sinking the well, but also the casings in the well, unless there be a contract to the contrary concerning their removal.’ ”

Moreover, it is to be noted that Paragraph 25 of the respective leases under which the moving defendants have been in possession of the real property sought to be condemned provide in part as follows:

“Within six (6) months after such expiration or termination, Lessee shall (subject to the rights and privileges granted the Lessee and to other provisions

of this lease) remove from such premises so terminated all of its rigs, machinery and other property, and shall, so far as possible, fill all sump holes and other excavations made by Lessee.' [Affidavit of G. de Bretteville in Support of Motion to Vacate Injunction—Tr. pp. 184, 185.]

In *Consolidated Ice Co. v. Pennsylvania Railroad Co.*, 73 Atl. 937, the court said:

"Clearly the plaintiff was not entitled to have considered, in ascertaining the value of the leasehold or to recover as an element of damage, the value of the machinery in place at the time of the institution of condemnation proceedings. By the terms of the lease, plaintiff company had the right, at the expiration of the term, to remove the machinery and fixtures placed on the premises by the lessee . . . The appropriation by the defendant determined the lease, but it did not take the fixtures and machinery placed upon the demised premises by the lessee . . . The filing of the bond by the railroad company was not, as we have seen, an appropriation of the improvements by the company imposing liability for their market value."

It necessarily follows that even though the original complaint was sufficient to give the court jurisdiction to condemn the defendants' leasehold interests under their subleases such original complaint, was not sufficient to include the equipment and supplies described in the exhibit attached to the amended complaint.

- (4) THIS COURT ACQUIRED NO JURISDICTION OVER THE PERSONAL PROPERTY DESCRIBED IN THE STATE COURT ACTION UNTIL THE FILING OF THE AMENDED COMPLAINT ON JANUARY 12, 1944.

The first mention of machinery and equipment is made in the amendatory resolution of October 4, 1943 [Tr. p. 81], pursuant to which the amended complaint was filed January 12, 1944, by which it is alleged in Paragraph VIII thereof, contrary to the undisputed facts, that on September 18, 1942, said RECONSTRUCTION FINANCE CORPORATION by resolution duly adopted by its Board of Directors resolved and determined that it was necessary for war purposes that the property, real, personal and mixed, herein described, be acquired by condemnation [Tr. p. 41] (when as a matter of fact said resolution only referred to land), and by Paragraph XIII it is alleged [Tr. p. 43]:

“That the property which the plaintiff by this action intends and seeks to take, acquire, and condemn, hold and own, includes the following:

“All pipe, machinery, appliances, equipment, tanks, structures, tools, supplies, and all other property, whether real or personal, which were located in or upon any of the said tracts of land hereinabove described, on the 28th day of September, 1942, and which on said day were used, or were useful, in the operation of any oil and/or gas wells, upon any of said parcels of land, or in the treating, storing, or disposing of the products of any of such wells.”

It is thus to be noted that the amended complaint makes no reference to the amendatory resolution of October 4, 1943, but Paragraph IV of the petition for injunction [Tr. p. 68] alleges that by the resolution of October 4,

1943, the Board of Directors of RECONSTRUCTION FINANCE CORPORATION approved, ratified and confirmed the taking, condemnation and possession of such machinery and equipment. The resolution, however, a copy of which was attached to the petition for an injunction and marked "Exhibit B" [Tr. p. 81], does not by its terms allege any ratification of any such taking, condemnation or possession by the RECONSTRUCTION FINANCE CORPORATION but simply recites that the DEFENSE PLANT CORPORATION has taken possession of such machinery and equipment and then proceeds to resolve that it is necessary for DEFENSE PLANT CORPORATION to acquire such machinery and equipment by condemnation, and further resolves that the secretary of RECONSTRUCTION FINANCE CORPORATION be authorized to request the Attorney General to take such action as may be necessary for the acquisition of such machinery and equipment by condemnation.

It is clear that the authority for the condemnation of such machinery and equipment is necessarily predicated on the amendatory resolution of October 4, 1943, pursuant to which the amended complaint was filed seeking the condemnation of such machinery and equipment or no such resolution would have been adopted or amended complaint filed. In as much as the right to condemn the machinery and equipment is based on the adoption of the resolution of October 4, 1943, after the filing of the original complaint, the adoption of such resolution should have been alleged by way of supplemental complaint rather than by an amended complaint. Moreover, it is to be observed that no declaration of taking nor decree of taking has been filed in respect to the machinery and

equipment either before or after the filing of the amended complaint on January 12, 1944.

In *United States v. Bauman*, 56 Fed. Supp. 109, the court in denying the motion for leave to amend, said at page 111:

“Furthermore, events occurring subsequent to the filing of an original complaint, must be set up by supplemental complaint rather than mere amendment.”

.

“A court order was granted allowing it to enter under the protection of the court in the exact terms of the complaint. The complaint which instituted the proceedings fixed the rights of the parties.”

It is clear from this that an amended or supplemental complaint by which additional or different property is sought to be condemned will not be effective, if at all, until the filing of such amended or supplemental complaint followed by an order for immediate possession and the entry of a declaration of taking and a decree upon declaration of taking in conformity with the terms of such amended or supplemental complaint.

It must be clear from the foregoing that if the machinery and equipment sought to be recovered in the State Court actions are deemed to be personal property the court acquired no jurisdiction over such machinery and equipment until the filing of the amended complaint on January 12, 1944, if in fact such jurisdiction was acquired at that time.

On the other hand, if such equipment be deemed to be real property by reason of the method by which some of it may be affixed to the land, it must likewise be concluded

that the court did not acquire jurisdiction in respect thereto until January 12, 1944. This is so for the reason that the resolution of September 18, 1942, the original complaint, the order for immediate possession dated September 28, 1942, the declaration of taking and the decree upon declaration of taking entered October 26, 1942, uniformly related only to land as distinguished from real property.

Sections 658, 659 and 660 of the *Civil Code* of the State of California provide as follows:

“658. (*Definition of real property: Severance by agreement.*) Real or immovable property consists of:

1. Land;
2. That which is affixed to land;
3. That which is incidental or appurtenant to land;

4. That which is immovable by law; except that for the purposes of sale, emblements, industrial growing crops and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale, shall be treated as goods and be governed by the provisions of the title of this code regulating the sales of goods.”

“659. *Land.* Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance.”

“660. (*Definition of fixtures: Severance by agreement.*) A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement,

plaster, nails, bolts, or screws; except that for the purpose of sale, emblements, industrial growing crops and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale, shall be treated as goods and be governed by the provisions of the title of this code regulating the sales of goods."

Assuming that by reason of the manner in which such machinery and equipment was affixed to the land within the meaning of Section 660 of the Civil Code, above quoted, the machinery and equipment, or some part thereof, is deemed to be a part of the real property, it would still be a different estate or interest in the real property than the appellants have in the land itself, which is defined by Section 659 of the Civil Code, above quoted, and would not be embraced within the meaning of the word "land" as used in the documents above referred to.

The court in *United States v. Bauman, supra*, in pointing out that only such an estate can be acquired by condemnation as is described in the complaint, said at page 113:

"It would be a vain thing to require condemnation proceedings to be initiated in a court if, thereafter, a declaration of taking could be filed which related to an entirely different piece of land or an entirely different estate in the same parcel and that title to the parcel or estate passes irrespective of a variance between that and the description in the complaint. Title, therefore, did not pass to the revised estates described in the purported declaration of taking here."

It is clear, therefore, that whether the machinery and equipment here in question be deemed to be real or per-

sonal property this court acquired no jurisdiction over such machinery and equipment until January 12, 1944, for the interest in such machinery and equipment would necessarily be something different and apart from the appellants' interest in the land itself, which was the sole subject of condemnation until the adoption of the amendatory resolution of October 4, 1943.

In *re Pearl River-Nanuet Highway No. 9006*, 291 N. Y. S. 846, the court said at pages 847 and 848:

"There is no power in the court, as a consequence of statutory authority or case law, to amend the petition or the judgment in the condemnation proceedings by way of including therein property not originally described in said petition pursuant to authority from the Board of Supervisors. *Matter of Willcox* (Fourth Ave. Subway), 213 N. Y. 218, 223, 225, 107 N. E. 499."

Even assuming that the additional land or property could be subjected to condemnation by the filing of an amended complaint in the same action surely upon authority of the last cited case the court would not acquire jurisdiction over such additional land or property until the filing of such amended complaint.

Subdivision (c) of Section 15 of Federal Rules of Procedure following 28 U. S. C. A. 723(c) provides as follows:

"(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

The amended complaint cannot relate back to the date of the filing of the original complaint in so far as the amended complaint seeks the acquisition by condemnation of the machinery and equipment which is described in the amended complaint, but is in no wise referred to in the original complaint.

See also,

Sink v. Mutual Life Ins. Co. of New York, 56 Fed. Supp. 306, 307.

The pleading which, in fact, is a supplemental complaint, that is, one which depends on matters which have transpired subsequent to the filing of the original complaint, is only effective from the date of its filing and does not relate back to the time of the filing of the original complaint. (See *Valensin v. Valensin*, 73 Cal. 106 at 109.)

Likewise, if an amended complaint relates to a new subject matter and constitutes a new cause of action it is only effective as of the time of its filing and does not relate back to the time of the filing of the original complaint. (*Merchants Nat. Bank v. Bentel*, 166 Cal. 473, and *Rideaux v. Torgrimson*, 39 Cal. App. (2d) 273.)

Actions in condemnation are *in invitum* and all of the statutory provisions in reference thereto must be strictly complied with. (*City of Los Angeles v. Glassell*, 203 Cal. 44.)

See also,

Witham Const. Co. v. Remer, 105 F. (2d) 371, 375, 376 (10th Circuit).

It is clear, therefore, that whether the so-called amended complaint be treated as an amended complaint or as a supplemental complaint and regardless of whether the machinery and equipment be deemed to be real or personal property such pleading introduces a different and an additional claim, that is, a claim for the condemnation of machinery and equipment not referred to in the original complaint and, therefore, such pleading did not relate back to the filing of the original complaint and hence the court acquired no jurisdiction over such machinery and equipment until January 12, 1944, upon the filing of the amended complaint. Under such circumstances the taking possession of personal property cannot be justified and resulted in an immediate cause of action in favor of appellant.

(5) THE COURT HAVING ACQUIRED JURISDICTION OF THE MACHINERY AND EQUIPMENT ON JANUARY 12, 1944, THE AWARD WHICH MAY BE MADE IN THE PRESENT ACTION IS LIMITED TO THE VALUE OF THE MACHINERY AND EQUIPMENT ON JANUARY 12, 1944.

The law is well established that the award must be predicated on the value of the property upon the date of the effective taking by the corporation or agency authorized by law to exercise the power of eminent domain.

In *United States v. Miller*, 87 L. Ed. 336, the United States Supreme Court on a writ of certiorari to the Circuit Court of the Ninth Circuit, said at page 343:

“Respondents correctly say that value is to be ascertained as of the date of taking.”

This, of course, means pursuant to a lawful taking for it is expressly held in *Loomis v. City of Augusta*, 99 P. (2d) 988 at 990, that no damages can be recovered in an action in condemnation except upon a lawful taking.

In *Nichols v. City of Cleveland*, 135 N. E. 291, it was held that:

“Where property has been appropriated in an invalid condemnation proceeding, damages in a subsequent valid proceeding are to be assessed as of the date of the hearing in the valid proceeding.”

The taking by an officer who is unauthorized so to do does not render the government liable in an action in eminent domain for such wrongful taking.

In *United States v. North American Transportation & Trading Co.*, 64 L. Ed. 935, the court said at page 937:

“In order that the government shall be liable, it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power.”

“What he had done before that date having been without authority, and hence tortious, created no liability on the part of the government.”

But when Union Oil Company took and retained possession of such personal property on or about September 28, 1942, a cause of action arose immediately in favor of appellants, and it is those causes of action sought to be enforced in the State Court.

(6) THE ONLY RECOVERY THAT CAN BE HAD BY THE APPELLANTS TREASURE COMPANY AND SAMARKAND OIL COMPANY IN THE CONDEMNATION ACTION IN RESPECT TO THE TAKING OF PERSONAL PROPERTY IS THE VALUE OF THE PERSONAL PROPERTY AT THE TIME OF THE FILING OF THE AMENDED COMPLAINT ON JANUARY 12, 1944, WHEREBY IT WAS SOUGHT FOR THE FIRST TIME TO CONDEMN THE PERSONAL PROPERTY.

In order for the owner of property to be entitled to the recovery of compensation in a condemnation action the taking must be lawful. The provisions of the law in respect to condemnation proceedings must be strictly complied with.

Section 2 of the U. S. C. A. 632 (Title II, 2nd War Powers Act) provides as follows:

“Upon and after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act (this section and section 171 of Title 50), notwithstanding any other law.”

In *City of Los Angeles v. Glassell*, 203 Cal. 44, the court said at page 46:

“It requires no citation of authority upon the proposition that eminent domain proceedings are *in invitum*, and the same may be said of proceedings to assess and collect any outlay necessary to the establishment of parks and playgrounds under the act here involved: . . . and the statutory authority must be strictly pursued, and every condition or other prerequisite to the exercise of jurisdiction be observed, especially every requisite of the statute having the semblance of benefit to the landowner . . .” (20 Corpus Juris, pp. 882, 883.)”

Section 1249 of the *California Code of Civil Procedure* provides in part as follows:

“For the purpose of assessing compensation and damages the right thereof shall be deemed to have accrued at the date of the issuance of summons and its actual value at that date shall be the measure of compensation for all property to be actually taken,”

It may be observed that in *United States v. North American Transportation and Trading Co., supra*, the commanding officer of the Army had taken possession of certain real property without authorization from the Secretary of War so to do. Thereafter the Secretary of War authorized the taking and the Government proceeded to erect improvements on the land. Compensation was allowed the owner in an action brought in the court of claims not upon the theory that the wrongful taking had been subsequently ratified but that the taking was a lawful one from and after the authorization by the Secretary of War.

The original taking being tortious there could be no ratification of the original wrongful taking which would enable the owner to recover in the condemnation action the value of the property at the time of the wrongful taking on September 28, 1942. This is so for the reason that the proceedings had in respect to the personal property prior to January 12, 1944, were void as such personal property and was not included in the original complaint in condemnation, the order for immediate possession, or in the decree of taking. If the requirements of the statute are not complied with the proceedings are void. (*Barker v. Kansas City*, 70 P. (2d) 5.)

(b) Although the So-called Amended Complaint in the Condemnation Action Was Filed January 12, 1944, Whereby It Was Sought to Condemn the Personal Property Described in the State Court Actions, the Commencement of the State Court Actions on September 27, 1945, and the Maintenance Thereof Do Not Constitute a Violation of the Rule That the Court Which First Acquires Jurisdiction in an Action in Rem Is Entitled to Retain Exclusive Jurisdiction of Such Action, Because the State Court Actions in so far as They Seek to Recover the Value of the Loss of the Use and of the Depreciation in Value of Such Personal Property Are Actions in Personam Rather Than Actions in Rem, and the District Court Is Without Jurisdiction to Grant Relief for the Unlawful Taking and Detention of Such Personal Property.

(1) THE RIGHT OF THE FEDERAL COURT TO RETAIN EXCLUSIVE JURISDICTION FIRST ACQUIRED TO THE EXCLUSION OF THE STATE COURT IS CONFINED TO CASES IN WHICH THE ACTIONS IN BOTH THE STATE AND FEDERAL COURTS ARE ACTIONS IN REM.

In *Toucey v. New York Life Ins. Co.*, 86 L. Ed. 100, the court said at pages 105 and 106:

“The rank and authority of the federal and state courts are equal but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist, the rule does not apply. Since that necessity does exist in actions *in rem* and does not exist in actions *in personam*, involving a question of personal liability only, the rule applies in the former but does not apply in the latter.”

In *Princess Lida v. Thompson*, 83 L. Ed. 285, the court said at page 291:

“Certain it is, therefore, that if both courts were to proceed they would be required to cover the same ground. This of itself is not conclusive of the question of the District Court’s jurisdiction, for it is settled that where the judgment sought is strictly *in personam*, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as *res judicata* in the other.”

If the provisions of the condemnation statute are not complied with the court has no power to proceed. (*Clay County Court v. Baker*, 241 S. W. 447.)

In *Housing Authority v. Forbes*, 51 Cal. App. (2d) 1, the court said at page 4:

“Under the act, however, certain steps must be taken before private property can be taken by eminent domain.”

It is obvious that the only recovery that can be had in the condemnation action in respect to the personal property is its value at the time of the filing of the amended complaint on January 12, 1944, leaving the owners without any compensation for depreciation of the property while in the possession of the Union Oil Company between the date of taking on September 28, 1942, and the filing of the amended complaint in the condemnation action on January 12, 1944.

The appellants do not by the State action seek to recover damages for the taking of personal property as of January 12, 1944, when the respondent could first legally

took possession of the personal property, but seek damages for the unlawful taking and retention of the personal property on and after September 28, 1942, and appellants having a valid cause of action for such taking and detention, the order enjoining the prosecution of such actions is erroneous and refusal to set it aside is an abuse of discretion.

Such rule is not applicable to Actions Nos. 505-967 and 505-968 in so far as such elements of damage suffered by the defendants in the condemnation action as cannot be recovered in the condemnation action are concerned, namely, damages caused by the wrongful taking and wrongful withholding thereof by the Union Oil Company from September 28, 1942, to January 12, 1944.

(c) The Conclusions of the Court and Its Decisions on the Motion for Injunction Rendered Herein by the Honorable Paul J. McCormick of the United States District Court on June 12, 1945, and the Findings of Fact, Conclusions of Law and Judgment Rendered by Judge William J. Palmer on October 24, 1945, in State Court Actions 489318 and 489319, Are Res Adjudicata in This Action, insofar as They Determine That the Personal Property of Appellants Taken on September 28, 1942, Was Wrongfully Taken and That Such Wrongful Taking Has Never Been Ratified by the Respondent Government or Any Agency Thereof.

As appears from the affidavit of G. de Bretteville served and filed herein all of the oil well drilling tools and equipment described and sought to be recovered by the respective State Court Actions Nos. 505-967 and 505-968, the prosecution of which actions was enjoined by the order now sought to be vacated, consists of movable property. It further appears from such affidavit and from

the complaints in such state court actions that certain tubing and sucker rods in the well are sought to be recovered. It is not sought to recover any casing in the well. The distinction between casing and tubing lies in the fact that the casing consists of a circular metal casement which serves to hold back the adjacent earth and thereby maintains the hole in which the removable metal tubing is placed and upon the end of the sucker rods is attached the pump which forces the oil to the surface. While it might be conceded that the maintenance of the casing in place is necessary to the maintenance of the well as an operating unit and, therefore, should be deemed to be an integral part of the leasehold which would be compensated for by the compensation allowed for the taking of the leasehold, such is not the case in respect to the tubing, sucker rods and other tools and equipment described in the complaints in the respective state court actions above referred to.

In *Brazos River Con. etc. Dist. v. Adkisson*, 173 S. W. (2d) 294, plaintiff brought an action to enjoin the defendant District from flooding plaintiff's oil wells. The defendant District filed a cross-complaint seeking to condemn an easement over the premises covered by plaintiff's leasehold. By the answer to the cross-complaint plaintiff alleged that he was the owner of the leasehold which had been flooded by the negligent operation of a reservoir and ruining plaintiff's twelve producing wells, casing and pumping units. The description of the equipment in question was set forth in the opinion as follows:

"That the flow tanks were connected with the flow lines. That the tanks were of steel, of 100 to 250 barrel capacity, some welded, some put together with bolts, and resting on heavy timber foundations. That on the lease in an iron house there was a central

power and an 18 foot band wheel power on a concrete foundation, with which appellee pumped eight of the wells. That this power was connected by pull rod lines, with pump jacks on the wells; that the pump jack sat over the well and lifted the sucker rods in the tubing and pumped the oil. That the sucker rods ran down through the tubing and connected with working slides. That the pump jacks were on timber foundations about 8 x 10 in size. The testimony gives in detail the operations and mechanics employed in producing oil wells."

It was contended by the District that if the equipment was deemed to be a trade fixture the taking of such fixture could not be estimated as a separate element of damage. The court in holding that if the fixtures were of such character that if put in by the owner they would constitute a part of the real property and must be paid for as a part of the real estate, said at page 299:

"The law applicable in condemnation proceedings, where such fixtures are involved is stated in 10 R. C. L. p. 143, par. 125, as follows: 'Where fixtures are of such a character that if put in by the owner, they would constitute a part of the real estate, *they must be paid for as real estate by the party condemning the land.*'"

But in holding that if such fixtures are not attached to the soil and the right to remove the same is reserved by the lessee by whom the fixtures are installed, such fixtures would not partake of the nature of the freehold and would not pass to the landlord but would remain the property of the lessee upon the termination of the lease, said at page 298:

"As to the nature of the casing and pumping equipment, the same text, based on an abundance of au-

thorities, says: 'It is a well-settled rule that casing in wells, derricks, engines, and other machinery and appliances placed upon the land by the lessee for testing, developing and operating the land for oil and gas purposes are trade fixtures. They may, therefore, be removed at any time during the existence of the lease, or within a reasonable time after its termination. If they are not so removed, they become the property of the landowner.' (*Summers on Oil & Gas*, Perm. Ed., Vol. 3, p. 214, Par. 526.

"The last sentence of that quotation is significant in that if such fixtures do not by attachment to the soil become a part of or partake of the nature of the freehold, then they would not become the property of the landowner."

The court in pointing out that the existence of the well as a unit was dependent upon the maintenance of the casing in the well, said at page 299:

"There is logic in appellee's reply to a hypothetical question, wherein he says: 'We can answer this by observing that (the primary term having expired) if the casing etc., did not go with a sale, but was pulled and retained by the Seller, there would be no production and no lease—and, therefore, no sale!'"

As we have pointed out, there is no attempt in the pending state court actions to recover the casing or compensation for its taking but the items which are thus sought to be recovered, or their value, consist of sucker rods, tubing, tanks and other equipment readily removable without injury to the equipment, or the leasehold, or the real property.

The same observations as to the nature of the equipment and tools sought to be recovered in the pending state

court actions are equally applicable to the items sought to be recovered in the state court actions entitled: Treasure Company, plaintiff, v. Union Oil Company, defendant, and Reconstruction Finance Corporation, a Federal Corporation, complainant in intervention, No. 489-318, and Samarkand Oil Company, plaintiff, v. Union Oil Company, defendant, and Reconstruction Finance Corporation, a Federal Corporation, complainant in intervention, No. 489-319, of the Superior Court of the State of California, in and for the County of Los Angeles.

An application by respondent for an injunction to restrain the prosecution of the last mentioned actions was denied by the Honorable Paul J. McCormick of the District Court, by an opinion rendered and filed therein on June 12, 1945. [Tr. pp. 52-63.]

As indicated, the Reconstructon Finance Corporation was substituted for Defense Plant Corporation, as intervenor in both of the last mentioned state court actions which terminated in judgments for the plaintiff in each of said cases and which judgments were entered December 6, 1945. These judgments became final and were satisfied by payment.

In the conclusions of the court and decision on motion for injunction, above referred to, the Honorable Paul J. McCormick not only held that the Superior Court of the State of California, in and for the County of Los Angeles, had exclusive jurisdiction of the causes of action set forth in the complaints in said actions Nos. 489-318 and 489-319 because such actions were commenced November 15, 1943, which was prior to the filing of the first authorized amended complaint on January 12, 1944, by which it was sought to condemn any personal property, but in hold-

ing that there was no ratification of the taking of the personal property on September 28, 1942, because the state court had already acquired jurisdiction on November 15, 1943, and before the filing of the amended complaint on January 12, 1944, said at transcript page 61:

‘There can be no serious claim of ratification by plaintiff of the seizure of the personalty because before any adequate manifestation by plaintiff of an intention to acquire such property was evident, the State court had already acquired jurisdiction of the *res*. The factual situation here is dissimilar to that before the court in *Yearsley v. Ross Construction Co.*, 309 U. S. 18. Moreover, the *Yearsley* decision does not enunciate the principle that ratification of a taking without condemnation proceedings *ipso facto* confers jurisdiction on the United States court.

“The sole method chosen to acquire the necessary war facility to which the action in this court relates was by condemnation proceedings of the judicial type brought as Title II of the Second War Powers Act specifies in accordance with the Act of August 1, 1888, Title 40 Sections 257, 258, U. S. C. A. One of the jurisdictional essentials of a proceeding in condemnation of the judicial type is that the property sought to be taken shall be described in the petition (complaint). See Section 1244, California Code of Civil Procedure.

“It is clearly established by the record before us that no specification whatever of any personalty was made in any of the proceedings until the month of October, 1943, when for the first time an authorization to amend the pleadings so as to include personal property was given, and it was not until the following January that the amended complaint directed to the acquisition of the personal property in issue was filed.

"Thus we find that the earliest effectual and authorized acquiring of the personal property by the Government was subsequent to the acquiring of jurisdiction over the same *res* by the State court in the recovery actions pending therein. As no other type of authority than judicial has been invoked or applied by plaintiff in the acquisition under consideration, we consider argument and authorities as to the lodgment in the United States of other processes in eminent domain as academic and irrelevant to the motion before the court."

Furthermore, Judge William J. Palmer in his notice of decision rendered in connection with the State Court Actions No. 489-318 and 489-319 in holding that the taking on September 28, 1942, was not by any agent of the Government and that no agency of the Government was authorized to ratify the taking of such personal property on September 28, 1942, and that such taking never has been ratified by the United States Government, said [Tr. p. 163]:

"This court has not found that the United States government, or any agency of it, seized the property involved in this case on or about September 28, 1942. The court does find that an individual who held the office of United States Marshal, without any authorization from any source, without process of court related to the property in question, without direction from any agency of the government, falsely assumed dominion over the property and falsely assumed authority to deliver it into the custody of the defendant, which, equally without right or authority, thereupon asserted and took dominion over the property and thereafter held possession thereof against the demands of plaintiffs for its return.

"This court has not held of its own opinion that any agency of the government ever came into lawful

possession of the property in question, but the court has presumed, for the purposes of this trial, that in permitting the filing of a late amendment to a condemnation action pertaining to real estate, by which amendment the action was made to embrace the personal property involved in this case, the United States District Court acted properly and in accordance with law. Involving that presumption leads to the conclusion that the property was condemned as of the date of the filing of the amendment and that thereupon the United States Government, through the Defense Plant Corporation, in exercise of the right of eminent domain came into lawful possession of the property.

“It would be inaccurate to leave the impression that this judge is of the personal opinion that the commencement of condemnation proceedings against the personal property involved in this case, by way of such amendment filed in January 1944, when the actions in this Superior Court were threatened and were about to be commenced, was in good faith or was founded on any need by the Government for the property or on any intention to put it to the *public* use. This court merely applies the presumption of good faith and regularity to the proceedings of the federal agencies involved.

“This court has not found that the action of the person who first asserted unlawful dominion over the property in September of 1942 and assumed authority to deliver it over to the defendant was thereafter ratified by any agency of the United States Government. To the contrary, this court is of the opinion that no agency of the United States Government had authority to ratify such an act and the court holds that no such agency ever did ratify it. The court finds also that the unlawful action of the defendant in detaining the property from the plaintiffs never had

been ratified by any agency of the United States Government, and the court is of the opinion that no such agency has had authority to ratify such conduct.”

The opinions thus expressed by Judge Palmer are reflected in Findings Nos. VII [Tr. p. 138] and XII [Tr. p. 141] of the formal findings of fact made and entered in said actions which findings of fact were signed December 5, 1945, and which findings read as follows:

“VII. On the said 28th day of September, 1942, at and on said Block 33 of Tract 9809 in said County of Los Angeles, State of California, without the plaintiff’s consent and against its will, a Deputy United States Marshal, without any authorization from any source, without process of court related to said personal property, and without direction from any agency of the United States Government falsely, and wrongfully and wilfully assumed dominion over the said personal property, and wrongfully and wilfully took possession thereof and wrongfully delivered said personal property to the defendant, Union Oil Company of California, a corporation, which said defendant on said date and at said place without right or authority wrongfully and wilfully took possession of said personal property and thereafter continuously and until January 12, 1944, wrongfully and wilfully held possession thereof and detained the same and wrongfully prevented the plaintiff Samarkand Oil Company, a corporation, from taking possession thereof.”

“XII. With respect to the second separate and distinct defense of said answer, the court finds that it is not true that on or about September 29, 1942, or at any time, the United States of America, for the use of Reconstruction Finance Corporation, a federal corporation, acting in behalf of Defense Plant Corporation, a federal corporation, or otherwise, appropriated or took possession of the personal property here-

inabove described or any part thereof under claim of eminent domain for use in connection with the establishment of a reservoir for the injection, storage, conservation or withdrawal of natural gas or incidental purposes or for use in the operation of oil or gas wells or in the treating, storing or disposing of the products thereof, or that it thereupon delivered said personal property or any part thereof to the defendant Union Oil Company of California, a corporation, for such uses or purposes or any of them on behalf of the Defense Plant Corporation, a federal corporation. It is not true that the said United States of America ever took possession of said personal property or any part thereof or enjoyed any lawful right to the possession or any part thereof until January 12, 1944.”

The conclusion of the court and decision on motion for injunction rendered by Judge McCormick and the findings of fact and conclusions of law and judgment rendered by Judge Palmer, above referred to, were pleaded as *res adjudicata* by the third and fourth defenses, respectively, in the answers [Tr. pp. 131-134, incl.] of Treasure Company and Samarkand Oil Company to respondent's petition for the injunction, which said defendants now seek to have vacated.

Section 1908 of the Code of Civil Procedure of the State of California provides as follows:

“The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:

1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or

the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person.

2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding."

An adjudication of a matter of fact is binding in subsequent proceedings between the same parties, as well as the adjudication of their rights. This is pointed out in *Johnson v. Fontana County Fire Pro. District*, 15 Cal. (2d) 380. In that case plaintiff sought a writ of mandamus to compel the defendant Fire Protection District to pay a judgment recovered by plaintiff in a prior action in which it was found as a matter of fact that the driver of a certain automobile was the agent of the defendant. In the mandamus proceedings the defendant District alleged that the driver of the automobile was not the agent of the District. The court in holding that the rule of *res adjudicata* applies to both questions of law and fact, said at page 389:

"Whether or not the previous judgment, with its implied finding of agency, was controlling here must depend upon general rules of law applicable to that question.

" 'A former adjudication between the same parties may be either a final determination of the rights of

the parties or may be an adjudication of certain questions of fact which have been put in issue and decided. (*People v. Bailey*, 30 Cal. App. 581, 158 Pac. 1036.) A judgment operates as an estoppel to prevent the parties thereto or their privies from contending to the contrary as to a matter of fact which was found against them in arriving at the judgment."

Not only is the respondent herein bound by the conclusions of law of Judge McCormick and the judgment rendered by Judge Palmer but is also bound by their findings of fact.

In *Todhunter v. Smith*, 219 Cal. 692, the court said at page 695:

"A former judgment operates as a bar against a second action upon the same cause, but in a later decision upon a different claim or cause of action, it operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action. (See authorities cited *supra*, this paragraph.)"

Therefore, even though the present pending state court Actions Nos. 505-967 and 505-968 involve different causes of action than the prior State Courts Actions Nos. 489-318 and 489-319 in that different drilling tools and equipment are sought to be recovered than in the first mentioned actions, nevertheless the findings in connection with the Actions Nos. 489-318 and 489-319 in respect to the taking of personal property on September 28, 1942, hav-

ing been done without authority from any governmental agency are binding upon the respondent in its application for an injunction restraining the prosecution of Superior Court Actions Nos. 505-967 and 505-968.

(d) The Determination by the Circuit Court of Appeals in This Condemnation Proceeding, in *United States v. Samuel Block*, 160 F. (2d) 604, That the Award Made for the Taking of Personal Property in Connection With Condemnation Proceedings Must Be Predicated Upon the Value of the Property When It Is First Lawfully Taken Pursuant to Such Proceedings, Is the Law of the Case.

On March 22, 1947, the United States Circuit Court of Appeals for the Ninth Circuit rendered an opinion upon an appeal taken by the plaintiff herein from an award made by the District Court to Sam Block (62 Fed. Supp. 1017), one of the other defendants in this action, for the taking of personal property at the same time and under the same circumstances as those under which the personal property of Treasure Company and Samarkand Oil Company was taken.

In the *Block* case entitled *United States v. Block* and reported in 160 F. (2d) 604, the respondent herein contended on appeal the District Court erred in admitting evidence of the value of the personal property on October 4, 1943, because the respondent contended that such personal property was taken on September 28, 1942. This court in holding that the respondent was not prejudiced by the testimony of the value of the property as of October 4, 1943, even though the personal property was taken on Septem-

ber 28, 1942, because there was evidence to the effect that the value of the personal property was the same on both dates, said at page 607 :

“Appellant says that the machinery and equipment were taken on September 28, 1942, and that testimony as to their value in October, 1943, was therefore inadmissible. There was and is some uncertainty as to when the machinery and equipment were taken. As stated above, the complaint was filed and an order granting appellant immediate possession of the land was entered on September 28, 1942, and a declaration of taking was filed on October 26, 1942, but the machinery and equipment were not mentioned in the complaint, the order or the declaration. The machinery and equipment were first mentioned in the amendatory resolution of October 4, 1943. The amendatory resolution stated that Defense Plant Corporation had taken possession of the machinery and equipment, but did not state when such possession was taken. It may have been taken on October 4, 1943.

“Even assuming that the machinery and equipment were taken on September 28, 1942, it does not appear that appellant was prejudiced by the fact that Rubin’s and Rush’s valuations were made as of October, 1943. Rush and Graydon Oliver, a witness for appellant, testified that the market value of the machinery and equipment in October, 1943, was substantially the same as on September 28, 1942. That testimony was not contradicted.”

It is obvious that the Circuit Court of Appeals determined that the award must be predicated upon the value of

the property upon the date that it was legally taken by a Governmental agency.

In *Security First National Bank v. Marxen*, 19 Cal. (2d) 100, the court said at page 103:

“The law of the case, as established by the judgment of reversal, is that the defendant expressly, by written agreement, and by joining in a subsequent lease, both of which were found by the court to have been duly executed, had subordinated its leasehold rights to the right and title of the plaintiff. The issues presented questions of law only. Those issues, decided adversely to the defendant on the former appeal, also require an affirmance of the judgment on this appeal.”

It is well established that an action in condemnation is an action *in rem*. In *Harrington v. Superior Court*, 194 Cal. 185, the court said at page 189:

“Condemnation proceedings have been described as proceedings *in rem*, and jurisdiction, therefore, does not depend on the disclosed identity of the parties defendant, but on the subject matter and an opportunity to be heard in the exercise of due process on the most effective notice possible.”

The present action being one *in rem* the decision by the Circuit Court of Appeals in *United States v. Block*, *supra*, above referred to, is binding on all parties interested in the matter whether they were parties to the former appeal or not.

See also,

De Gear v. McLellan, 56 Cal. App. (2d) 382, 385.

It is apparent that the holding that the decision in the former appeal was binding on the plaintiff in the second action although she was not a party to the prior appeal is based on the fact that the decision in such prior appeal was rendered in an action *in rem* and, therefore, binding on all parties interested in the matter.

Estate of Carothers, 168 Cal. 691, 693-4-5:

The present condemnation proceeding being one *in rem* the decision of the Circuit Court of Appeals rendered in *United States v. Block*, *supra*, above referred to, is the law of the case in respect to the proposition of law that any award made in this case must be predicated on the value of the personal property at the time that it was first legally taken by an agency of the government. We have seen that the findings of Judges McCormick and Palmer to the effect that there was no legal taking of the personal property prior to January 12, 1944, are now final and *res adjudicata* and that plaintiff herein is estopped from questioning the correctness of such findings. It follows that the only award which this court can make or which the Circuit Court of Appeals can properly uphold for the taking of the personal property is one predicated on the value of such personal property on January 12, 1944.

(e) The Prosecution of the State Court Actions Will in No Wise Interfere With the Jurisdiction of the District Court to Proceed to Trial and to Make an Award to These Appellants for the Value of Their Leasehold Interest in the Real Property and the Value of Their Personal Property at the Time of the Filing of the Amended Complaint in the Condemnation Action on January 12, 1944.

(1) ON MARCH 10, 1945, THE RESPONDENT IN THE CONDEMNATION ACTION FILED A PETITION FOR AN INJUNCTION TO RESTRAIN THE DEFENDANT TREASURE COMPANY FROM PROSECUTING ACTION No. 489-318 AND TO RESTRAIN SAMARKAND OIL COMPANY FROM PROSECUTING ACTION No. 489-319 WHICH CASES WERE THEN PENDING IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES. BY SAID ACTIONS THE RESPECTIVE PLAINTIFFS THEREIN SOUGHT TO RECOVER POSSESSION OF CERTAIN PERSONAL PROPERTY CONSISTING OF OIL DRILLING EQUIPMENT OR THE VALUE THEREOF IF POSSESSION COULD NOT BE HAD. THE PERSONAL PROPERTY SOUGHT TO BE RECOVERED IN THE LAST MENTIONED ACTIONS WERE PERSONAL PROPERTY OTHER THAN THAT DESCRIBED AND INVOLVED IN ACTIONS NOS. 505-967 AND 505-968 BUT SUCH PERSONAL PROPERTY WAS WRONGFULLY TAKEN BY THE INDIVIDUAL ACTING AS UNITED STATES MARSHAL AND WRONGFULLY RETAINED BY THE UNION OIL COMPANY UNDER THE SAME CIRCUMSTANCES AND UNDER THE SAME UNTENABLE CLAIM OF AUTHORITY WHICH OBTAINS IN RESPECT TO ACTIONS NOS. 505-967 AND 505-968.

The Honorable Paul⁶ J. McCormick, of the United States District Court, denied the application to restrain the prosecution of Actions Nos. 489-318 and 489-319 on the grounds that the state court had acquired exclusive jurisdiction of the *res* by the serving of processes in

such actions prior to the filing of the amendment to the complaint in the condemnation action on January 12, 1944, and on the further ground that in as much as it was apparent that the only relief which would be granted in the state actions would be by way of a money judgment, the prosecution of such actions would not impair nor defeat the jurisdiction of the District Court in the condemnation action. In this connection Judge McCormick said [Tr. p. 63]:

"We conclude with the observation that the injunction to restrain proceedings in either of the state court actions is unnecessary under the record before us. In the local suits no relief to the oil companies other than money judgments appears to be now possible. Such an outcome in the state court would neither impair nor defeat the jurisdiction of this court in the condemnation proceeding."

As indicated in the answers of the Union Oil Company filed in Actions Nos. 505-967 and 505-968, Actions Nos. 489-318 and 489-319 did proceed to a money judgment, which judgments have been paid and satisfied. It is likewise probable that each of the state actions, the prosecution of which is now sought to restrain, will terminate in a money judgment rather than a judgment for the possession of the property described in the complaints in said actions. In fact, no judgment excepting a money judgment can be rendered in Actions Nos. 505-967 and 505-968.

Prior to the denial of such injunction by Judge McCormick the defendant Union Oil Company and the intervenor, Defense Plant Corporation, in Actions Nos. 489-318 and 489-319 sought to abate such actions on the grounds that the above entitled condemnation action was

then pending and involved the same issues as did such state cases and that the judgment in the condemnation action would be a bar to any judgment in each of said state cases.

This motion for abatement was denied by Judge William J. Palmer in the Superior Court of the County of Los Angeles [Tr. p. 155]. The holding of Judge Palmer was predicated primarily upon the principle that if the District Court found that the original taking was unlawful and did not become lawful until the filing of the amended complaint, the Treasure Company and the Samarkand Oil Company would be unable to recover in the condemnation action any compensation or reimbursement for the wrongful detention and depreciation of the personal property from September 28, 1942, to January 12, 1944.

Judge Palmer in a most able manner in a written opinion pointed out that regardless of what conclusion might be reached in the state or federal courts in regard to the question of whether the original taking was lawful or unlawful, any judgments rendered in the state court actions could not impair or interfere with the assessment of the proper measure of damages in the District Court.

In discussing the effect of the possible alternative conclusions which might be reached by the two courts Judge Palmer aptly set forth the situation as follows [Tr. p. 158]:

“If the Federal court, in action No. 2454-B Civil, should hold that possession of the personal property never was lawfully taken from the plaintiff, no judgment in condemnation would ensue, and plaintiff would leave the Federal court with no compensation whatsoever for the damage claimed to have been suf-

ferred from the acts of Federal officials thus held to have acted unlawfully.

"If the Federal court, in action No. 2454-B Civil, should hold that possession of the personal property was not lawful prior to the filing of the pleading titled a 'First Amended Complaint,' but became lawful at that time, the court would be powerless in that action to do anything about the unlawful possession previous to that date. Although in condemnation a property owner is supposed to receive full compensation for the property taken and for the damages suffered from the taking, the damages thus embraced are only those that flow from the lawful taking. They do not include injury suffered from prior unauthorized and unlawful acts of public officials. Hence, in the event of the possibility here being considered, the Federal court could not give plaintiff any relief for an element of damage claimed to have been suffered and claimed to be substantial.

"If the Federal court should decide that the taking of the personal property was lawful in the first instance and that thereafter the holding of possession against the plaintiff has been lawful, and if such a decision should follow a judgment of this court against the plaintiff, plaintiff would stand before the Federal court as the one to be compensated for the taking of the property. No difficulty or entanglement of status would result from the two trials.

"If prior to such a judgment of the Federal court, this court were to deliver a judgment in plaintiff's favor against the Union Oil Company of California, such judgment of this court would be founded on one of two theories: 1. That the taking of possession by federal officials was unlawful and the holding of possession since has been unlawful. In such a case, the judgment of this court, except for the element of

damages, would be in the alternative. If the defendant should pay the adjudicated value of the property rather than return it, or if judgment for such value should be satisfied by execution, the title to the property would pass to defendant. The Union Oil Company of California then would stand before the Federal court as the party to be compensated for the property. No entanglement of status would obstruct the orderly proceedings of that court. As there is no likelihood of defendant returning the property to the plaintiff so long as the Federal action pends, we need not spend time on that possibility.

“2. If this court should hold that the taking of the property was unlawful in the first instance, but became lawful when the ‘First Amended Complaint’ was filed in the Federal action, it might pursue either of two courses, depending on how it viewed the law. 1. It might regard the present factual status as a complete defense to replevin, and award only damages suffered by plaintiff from the date of the taking to the date of the filing of the amended pleading. In that case, plaintiff would stand before the Federal court as the one to be compensated for the property, and no entanglement of status would obstruct the orderly proceedings of that court. 2. It might find against the defendant, concluding that if defendant had not retained the personal property, that property would not have remained on the land, and no occasion for filing the amended pleading would have existed. So viewing the matter, the court might hold that the defendant had converted the property, and as defendant would not be able to redeliver, an alternative judgment would be useless. This court then would give plaintiff judgment for damages and for the value of the property. The title to the property would be vested in defendant; and defendant then

would stand before the Federal court as the one to be compensated. No entanglement of status would obstruct the orderly proceedings of that court.

“For the reasons that I have indicated, I hold that the duty of this court is to try the action and that a serious injustice might be done to plaintiff to deny to it the day in court to which it appears to be entitled. I do not consider it necessary to deal with certain other, and perhaps more ‘technical,’ rules, which also may be obstacles to the pleas in bar and abatement.”

It is thus seen that there is no eventuality in respect to the possible decisions which might be rendered by the state court in the actions now sought to be enjoined or by the federal court in the condemnation action which will impair or interfere with the orderly proceedings of the District Court and the awarding of proper damages to the parties entitled thereto.

It necessarily follows that the injunction should have been denied.

(2) IT NO DOUBT WILL BE CONTENDED THAT APPELLANTS ARE ESTOPPED BY THEIR CONDUCT FROM MAINTAINING THE STATE ACTIONS.

An examination of the Amended Answer of Treasure Company to the First Amended Complaint [Tr. pp. 49, 50 and 51] and the Answer of Appellant Samarkand Oil Company to the First Amended Complaint [Tr. pp. 47-48], will show that each alleges that said personal property “was unlawfully taken by the United States of America, Reconstruction Finance Corporation, Defense Plant Corporation, and their agents.”

The prayer to each answer is:

- “(1) That the above entitled action be dismissed;
- (2) That in the event that said action is not dismissed as to real or personal property, and a decree of condemnation is ordered, that plaintiff be ordered to pay damages.”

We do not want to have any misapprehension on the part of this Court as to our position.

We say that as to the personal property the District Court had no jurisdiction to condemn such personal property or to order payment for its taking, or to order immediate possession, until there was filed in the District Court a condemnation action seeking to condemn personal property.

Even if Reconstruction Finance Corporation had an intent to take personal property when the original suit was filed, such intent did not give Reconstruction Finance Corporation or Defense Plant Corporation the right to take such personal property until two things happened: (1) Reconstruction Finance Corporation determined the necessity of taking and directed the property to be taken, and (2) a condemnation suit was actually filed to condemn such property.

Until such two things happened the taking of possession by the Marshal and by Union Oil Company was unlawful.

No doubt the Court's attention will be called to the order of Judge Beaumont for immediate possession. It is to be found, beginning on page 14 of the Transcript in this Appeal. It will be noted this applies only to real property.

As the Reconstruction Finance Corporation had not adopted a resolution for taking anything but land, appellee had no right to file any suit for anything but land and did not do so.

The Court was without jurisdiction to entertain any suit to condemn personal property, until there was first a resolution by Reconstruction Finance Corporation authorizing its taking.

The aforesaid language merely directed that service be made, by posting the order for immediate possession upon the derricks and tanks upon the land.

But if this order should be construed to be an order for immediate possession of personal property, it would be utterly void, for said District Court had no jurisdiction to order immediate possession of personal property, until a suit seeking its condemnation was filed.

(f) Defendant Treasure Company Having the Right to Remove Improvements Put on the Land Covered by Its Lease, It Was Not Entitled to Recover Compensation for Such Improvements in This Condemnation Action, Until the Supplemental or Amended Complaint Was Filed.

Not only are the appellants TREASURE COMPANY and SAMARKAND OIL COMPANY granted the right by the lease and their respective subleases to remove within three months after the termination thereof any of the derricks, machinery, rigs, pipes, pumping stations or other improvements belonging to or furnished by the lessee or sublessee as stated in the affidavit of G. DE BRETTEVILLE [Tr. pp. 184, 185], filed in said proceedings, but by the terms of Paragraph 25 of the Fletcher lease to TREASURE

COMPANY covering Lots 9, 10 and 11 of Block 33, Tract 9809 and upon which Treasure Well No. 8 is located and upon which practically all of the personal property sought to be recovered by TREASURE COMPANY in the State Court Action No. 505-967 is located, requires that the lessee shall remove all rigs, machinery and other property, and in so far as possible, fill all sump holes and other excavations within six months after the termination of the lease. Under these provisions of the lease and respective subleases under which the defendants were operating at the time of the commencement of this action it cannot be contended that the equipment placed on the premises by these defendants became such an integral part of the leasehold as to require the Government to compensate these defendants for the taking of such equipment unless and until such time as such personal property is properly made the subject of an action in condemnation.

In *In re Acquisition of Certain Property on North River*, 103 N. Y. Supp. 908, it was held that while the defendant tenant in a condemnation proceeding is entitled to receive the reasonable value of the machinery installed by him which had become a part of the building but that such tenant is not entitled to be compensated for such machinery as can be readily removed and would have a substantial value disconnected from the building.

It follows that the appellants herein are not entitled to be compensated in the above entitled condemnation action for the value of the personal property illegally taken by the UNITED STATES MARSHAL and delivered to UNION OIL COMPANY.

- (g) The Provisions of Section 265 of the Federal Judicial Code (28 U. S. C. A. 379) Renders the Granting of the Injunction in This Case Erroneous, an Abuse of Discretion, and a Violation of Established Principles of Law, and Therefore, Said Order Refusing to Vacate Said Injunction Should Be Reversed.

Section 265 of the Judicial Code (28 U. S. C. A. 379) reads as follows:

“Section 379. (Judicial Code, section 265.) Same; stay in State Courts. The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. (R. S. Section 720; Mar. 31, 1911, c. 231, Section 265, 36 Stat. 1162.)”

The only exceptions, save one, to the clear and positive language of Section 265 of the Judicial Code, since its adoption in 1793, have been raised by express statutory enactments, namely, by the Bankruptcy Acts; The Removal (of actions) Acts; Limitation of Shipowners Liability Act; The Interpleader Act; and the Frazier-Lemke Act, none of which apply in the case at bar.

The one exception, which was not by Congressional Act was “imbedded in number 265 by judicial construction” in the so-called “*res*” cases.

Toucey v. New York Life Insurance Co., 314 U. S. 118, 139, 86 L. Ed. 100, 108.

In that case it was held that the doctrine of the “*res*” exception had its roots in the same policy from which the rule of Section 265 sprang, that is, the necessity of eliminating friction between the Federal and State Courts,

and was a firmly established doctrine when Section 265 was enacted, and that it should not be extended further, and had no application to "*non-res*" cases, actions which were not *in rem*.

In *Southern Railway Company v. Painter*, 314 U. S. 155, 86 L. Ed. 116, the Supreme Court extended this line of authority and held that Section 265 of the Judicial Code prevented a Federal Court from enjoining State Court action, in personal actions, even in aid of previously instituted litigation in the Federal Court. In that case the respondent brought an action in 1939 against the petitioner in the Federal District Court for the Eastern District of Missouri to recover damages under the Federal Employer's Liability Act, for the wrongful death of her husband while employed on petitioner's railroad between points in Tennessee and North Carolina. While this action was pending, petitioner filed a bill in the Chancery Court of Knox County, Tennessee, to enjoin petitioner from proceeding in the said Federal Court. An injunction was issued and became final. The respondent filed a "Supplemental Bill" in the Federal Court to enjoin the proceedings in the State Court. The Federal District Court issued the injunction and was sustained by the Circuit Court for the Eighth Circuit (117 F. (2d) 100). The case went to the Supreme Court of the United States on writ of certiorari, and the lower courts were reversed, for the reason that their decisions violated the provisions of Section 265 of the Judicial Code (28 U. S. C. A. 379). At page 159 of the decision (86 L. Ed. 118), it is said:

"The restrictions of Section 265 upon the use of the injunction to stay a litigation in a State Court

confine the district courts, even though such an injunction is sought in support of an earlier suit in the Federal Court.”

The applicability of the above exception for Section 265 of the Judicial Code to actions *in rem* only, and not to personal actions, was recognized in these very condemnation proceedings by Judge McCormick in his decision above referred to.

62 F. Supp. 1017, 1020(3).

The State Court actions 505-967 and 505-968 are not *in rem* so far as the elements of damages for the wrongful taking of the personal property, its wrongful detention and deterioration during such detention, are concerned. Therefore, not being actions *in rem*, Section 265 of the Judicial Code applies, and any injunction issued by the Federal District Court restraining the prosecution of the State Court action is improper and contrary to law, even though it may be in aid of previous federal litigation.

Conclusion.

In conclusion we submit that Judge Beaumont erred in failing to grant the motion of appellant to vacate and set aside the temporary injunction theretofore granted. The record discloses that the petition for an injunction was under submission for many months prior to the order granting the injunction. This ruling was directly contrary to the ruling of Judge McCormick on a similar motion. Thereafter appellants sought to have said order granting such injunction vacated and set aside. We sub-

mit that the Judge clearly erred in failing to do so for the following reasons:

When the suit was filed it sought to condemn land only. This was pursuant to the resolution of Reconstruction Finance Corporation to take land, and all proceedings in said action involved only land. Notwithstanding such fact, the United States Marshal, under a decree for immediate possession, which only authorized him to take land, did take into possession personal property. As pointed out by Judge Palmer and by Judge McCormick this was entirely outside the power of the Marshal. If Judge Beaumont had directed the taking of personal property it would have been a void order and beyond the jurisdiction of the Court, because Reconstruction Finance Corporation, which is the only corporation authorized to determine the necessity for taking, determined only that it was necessary to take land. Union Oil Company of California took the personal property, unlawfully seized by the Marshal, and retained it from on or about September 28, 1942, and no action was taken by Reconstruction Finance Corporation to authorize the taking of the personal property, or the filing of the suit therefor, until October, 1943. During that entire time the personal property was in the possession of Union Oil Company of California who, although claiming to act as an agent of the Government, had no lawful right to retain it, because no Governmental Agency, which it claimed to represent, had a right to retain it. Union Oil Company unlawfully refused to return said property to appellants upon demand.

Appellants are California corporations and Union Oil Company of California is a California corporation, and the Superior Court of Los Angeles County had jurisdic-

tion to try said cause. It is to the advantage of appellants to file said cause and to have the issue determined in the State Court because the United States District Court has no jurisdiction to award damages for such unlawful taking and detention of property. The jurisdiction of the District Court in the condemnation suit is limited to the awarding of damages for property lawfully taken. If the injunction continues in effect, the result will be that in the condemnation suit appellants will be compensated for the value of the property when it was first lawfully taken and withheld, to wit, January 12, 1944, the date of the filing of the Amended Complaint, together with interest thereon from such date. The property greatly depreciated in value between September 28, 1942 and January 12, 1944, during all of which time the property was exposed to the elements. If appellants are prevented from trying the State Court action, the District Court will not be in a position to compensate appellants for the value of the property at the time it was unlawfully taken, nor will they be entitled to interest from the date of the actual seizure. However the State Court does have jurisdiction to award appellants damages for such unlawful taking and detention. Under such circumstances the Court was guilty of an abuse of discretion in granting the temporary injunction and in refusing to set it aside.

This appeal is not taken merely because of an arbitrary desire on the part of appellants to try said cause in the State courts. They feel that by the unlawful conduct of the Government and of Union Oil Company they have been deprived of substantial rights, which can only be relieved by a judgment of the only Court which can grant them adequate relief.

It is obvious that the Government recognizes the fact that it erred in taking possession of the personal property, because it has attempted by Paragraph VIII of the Amended Complaint to cause the District Court and this Court to believe that the resolution of September 18, 1942 was sufficient to authorize the taking of the personal property, for it alleges as part of said paragraph:

“That on September 18, 1942, said Reconstruction Finance Corporation, by a resolution duly adopted by its Board of Directors, resolved and determined that it was necessary for war purposes that the property, real, personal, and mixed, herein described, be acquired by condemnation, and that in connection therewith, the immediate right to occupy, use and improve said property be acquired.” [Tr. p. 41.]

This pleading attempts to plead the legal effect of the resolution of September 18, 1942. However an examination of the aforesaid resolution of September 18, 1942 which is attached as Exhibit “A” to the Amended Complaint, and will be found at pages 77 and 78 of the Transcript, will clearly demonstrate that the allegation contained on page 41 was absolutely untrue. As a matter of fact the first mention of personal property is made in the resolution adopted in October, 1943.

The District Court had no authority or jurisdiction to order the taking of immediate possession of the personal property, until January 12, 1944 nor did it attempt to do so. While some decisions have held that it is not necessary that a formal order be made, still the resolution, which is the only authority for taking possession of personal property was adopted in October, 1943 and the right to take said personal property first arose on January

12, 1944, the date of the filing of the Amended Complaint first mentioning personal property. Therefore the taking and detention of the personal property prior thereto was wholly unlawful.

We respectfully submit that the Court should promptly reverse the order of Judge Beaumont refusing to set aside the injunction and permit appellants to proceed with their actions in the State Court to recover damages for the unlawful taking and withholding of the personal property.

Respectfully submitted,

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Attorneys for Appellants.

No. 11768

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

**TREASURE COMPANY, A CORPORATION, AND SAMARKAND
OIL COMPANY, A CORPORATION, APPELLANTS**

v.

UNITED STATES OF AMERICA, APPELLEE

**ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION**

BRIEF FOR THE UNITED STATES

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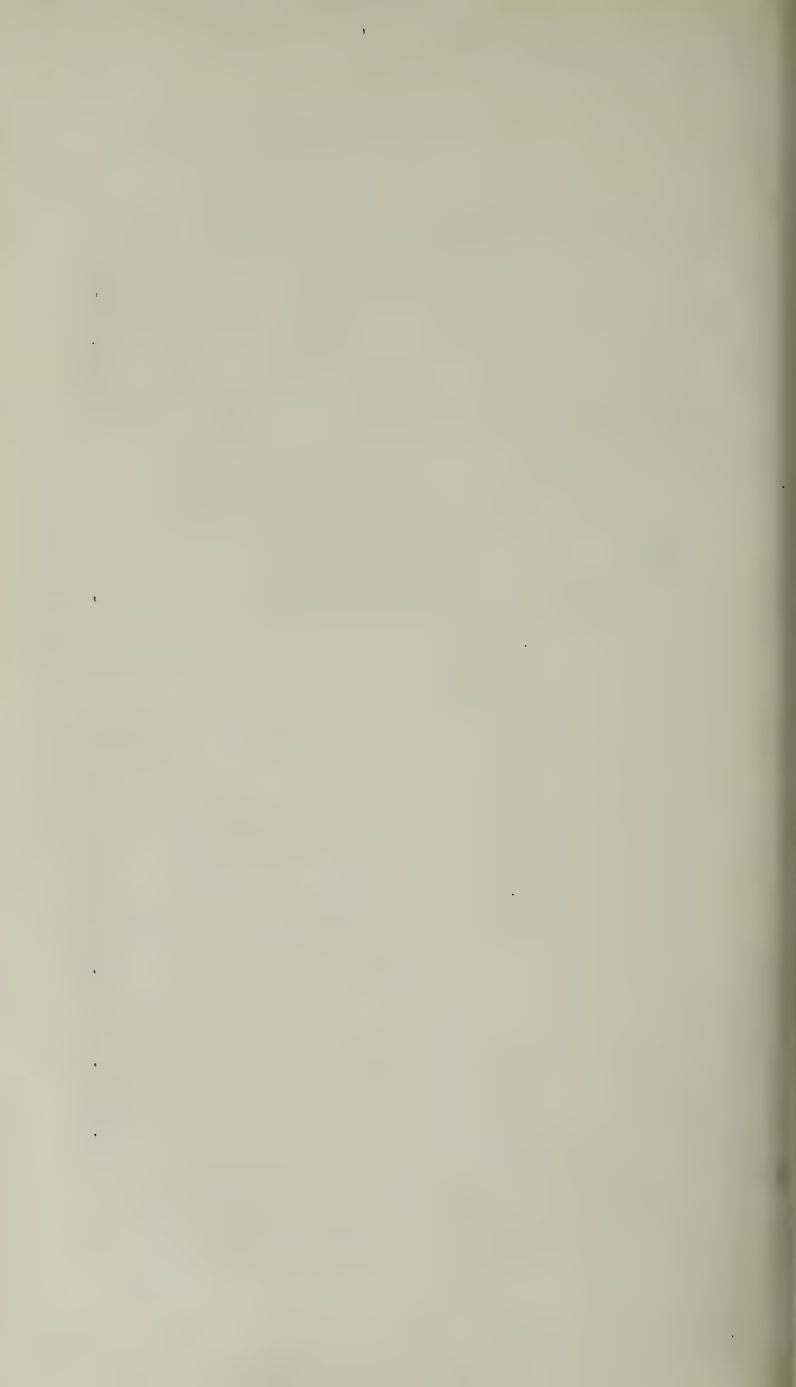
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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11768

**TREASURE COMPANY, A CORPORATION, AND SAMARKAND
OIL COMPANY, A CORPORATION, APPELLANTS**

v.

UNITED STATES OF AMERICA, APPELLEE

*ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court did not write an opinion.

JURISDICTION

This is an appeal from an order of the district court (R. 185) denying appellants' motion (R. 179-182) to vacate a temporary injunction entered on January 27, 1947 (R. 171-178). The district court's jurisdiction to issue the temporary injunction rests upon section 262 of the Judicial Code, 28 U. S. C. sec. 377.

The order appealed from was entered in a condemnation proceeding instituted by the United States. That proceeding was instituted under authority of

section 5d (5) of the Act of January 22, 1932, 47 Stat. 5, as amended March 27, 1942, 56 Stat. 174, 15 U. S. C. sec. 606b (5), and Title II of the Second War Powers Act of March 27, 1942, sec. 201, 56 Stat. 176, 177, 50 U. S. C. sec. 632, as extended by Executive Order 9217, August 7, 1942, 7 F. R. 6177.

The order appealed from was entered on August 4, 1947 (R. 185). Notice of appeal was filed on August 18, 1947 (R. 186). This Court's jurisdiction rests upon section 129 of the Judicial Code, 28 U. S. C. sec. 227.

QUESTIONS PRESENTED

1. Whether a federal district court, having acquired jurisdiction over property by the institution of condemnation proceedings by the United States, has power to enjoin temporarily the prosecution of actions subsequently brought in a state court to recover such property or damages for its withholding.

2. If so, whether the federal court erred in refusing to set aside an order temporarily restraining prosecution of the state court actions pending determination of the condemnation proceeding.

STATUTES INVOLVED

Section 262 of the Judicial Code, 28 U. S. C. sec. 377, so far as material, provides:

The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Section 265 of the Judicial Code, 28 U. S. C. sec. 379, provides:

The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except where such injunction may be authorized by any law relating to proceedings in bankruptcy.

STATEMENT

This is an appeal from an order refusing to set aside an interlocutory injunction which, pending determination of a condemnation proceeding instituted by the United States, restrains appellants from proceeding further in two actions brought by them in the Superior Court of Los Angeles County, California, against the Union Oil Company to recover certain property or damages for its withholding.

The material facts are as follows:

On September 19, 1942, the Reconstruction Finance Corporation, at the request of its subsidiary, the Defense Plant Corporation, requested the Attorney General to institute proceedings to condemn described lands for use as a storage reservoir for natural gas (R. 77-80). On September 28, 1942, the United States filed a complaint to condemn the fee simple title (R. 2-13). An order for immediate possession was entered by Judge Beaumont on the same day (R. 14-19), and the Defense Plant Corporation took possession. It employed Union Oil Company to maintain and operate the property (R. 67).

Later (a question having been raised as to whether certain oil-well equipment was included in the com-

plaint) the Reconstruction Finance Corporation amended the request of September 18, 1942, enumerating and expressly including such equipment. Accordingly, an amended complaint in condemnation was filed on January 12, 1944 (R. 37-46). Being unable to determine at that time whether the property described was real or personal, the Government referred to it in the amended complaint as "personal property and trade fixtures," solely for the purpose of identification (R. 44).

Before the condemnation complaint was amended, and on November 15, 1943, each appellant had filed in the Los Angeles Superior Court a claim and delivery action against Union Oil Company to recover part of the equipment subsequently covered by the amended complaint in condemnation. Defense Plant Corporation intervened and Reconstruction Finance Corporation later was substituted (see R. 135-136). The state court denied motions to abate these actions (R. 155-161), and the Government asked the court below to enjoin their prosecution. The motion was passed upon by Judge McCormick. Relying upon the doctrine of "first in time" in actions in rem, he held that the state court acquired jurisdiction of the res prior to the filing of the amended complaint in condemnation. Accordingly, he refused to enjoin the state actions (R. 52-63). They proceeded to trial and judgment (R. 135-151, and see Br. 8). The court found the property involved, consisting of oil drilling tools and equipment not attached to the land, was personal property (R. 138).

On September 27, 1945, each appellant filed another suit against Union Oil Company in the state court to recover possession of additional property located on the lands condemned or, in lieu of the property, damages for its withholding (R. 71). On March 26, 1946, the Government filed its petition in the court below for an injunction restraining prosecution (R. 66-76). Appellants answered (R. 121-151). After hearing (R. 197-266), the court below (Judge Beaumont) granted the injunction on January 27, 1947.¹

On May 28, 1947, appellants served notice of motion for an order vacating the injunction (R. 179-182). On August 4, 1947, the court below entered its order refusing to vacate the injunction, and appellants appealed (R. 185, 186).

ARGUMENT

I

The district court has the power to issue the temporary injunction

A. Section 265 of the Judicial Code does not bar the issuance by federal courts of injunctions restraining state court proceedings in cases where such relief is sought by the United States.—Section 262 of the

¹ Each appellant also brought an action to recover the value of oil alleged to have been wrongfully extracted by the Union Oil Company (see R. 72-73). Restraint of the prosecution of these actions was also asked (R. 76). At the hearing which resulted in issuance of the restraining order, counsel for appellants agreed that these oil cases related to real property and so would not be tried until determination of the condemnation proceeding (R. 261-262). Because of this agreement, the restraining order did not embrace these actions (R. 173).

Judicial Code, 28 U. S. C. sec. 377 (p. 2, *supra*), clothes federal district courts with "power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions." Section 265 of the Judicial Code, 28 U. S. C. sec. 379 (p. 3, *supra*), subsequently enacted, provides that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State." The general powers previously given were obviously limited by section 265. *Toucey v. N. Y. Life Ins. Co.*, 314 U. S. 118, 132 (1941).

Appellant argues (Br. 70-72) that the injunction issued in this case falls within the prohibition of section 265. However, statutes of general import, but not naming the United States, will not be construed to restrict or impair the rights of the United States. *Dollar Savings Bank v. United States*, 19 Wall. 227 (1873); *United States v. Herron*, 20 Wall. 251, 263 (1873); *United States v. Amer. Bell Telephone Co.*, 159 U. S. 548 (1895); *United States v. Stevenson*, 215 U. S. 190 (1909); *United States v. Mine Workers*, 330 U. S. 258 (1947); *United States v. Wyoming*, 331 U. S. 440 (1947).

This principle has been uniformly applied in the construction of statutes which, like section 265, in general terms, contract the judicial power of the federal courts. Thus, in *United States v. Amer. Bell Telephone Co.*, 159 U. S. 548, 554 (1895), a statute cutting off appeals to the Supreme Court in a certain class of cases was held not to deny to the

United States the right of appeal in such cases. In *United States v. Mine Workers*, 330 U. S. 258, 270 (1947), it was held that restrictions imposed by the Clayton Act upon "employers" did not apply to the United States "where there is no express reference to the United States and no evident affirmative grounds for believing that Congress intended to withhold an otherwise available remedy from the Government." In the same case the Court held that section 4 of the Norris-LaGuardia Act, divesting federal courts of jurisdiction to issue injunctions in a specified class of cases (labor disputes) did not operate to divest the court of power to issue such an injunction at the request of the United States. The Court, after noting that the statute was in general terms and did not expressly except the United States, stated (330 U. S. 272) that: "There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect." In accord with that rule, it has been held that section 265 does not prohibit the issuance of injunctions to stay state court proceedings where the United States is the petitioner. *United States v. Dewar*, 18 F. Supp. 981, 983 (Nev. 1937). Appellants cite no decision holding otherwise.

B. *Even if section 265 of the Judicial Code applied to the United States, it does not deprive the court below of power to issue the injunction here complained of.*—At Br. 43-45 and 70-72, appellants correctly state that section 265 leaves in the federal

courts the power to issue injunctions restraining the prosecution of state court proceedings in situations where both actions are in rem or quasi in rem and the action in the federal court is instituted before the action was filed in the state court. *Princess Lida v. Thompson*, 305 U. S. 456, 466 (1939). As Judge McCormick held (R. 57), a condemnation proceeding is in rem, and its commencement places within the jurisdiction of the court the control, actual or potential, of the res. *United States v. Dunnington*, 146 U. S. 338, 352 (1892). Accordingly, at least as early as January 12, 1944, upon the filing of the amended complaint, the court below had within its jurisdiction and control all of the property described therein, including the property on which appellants later instituted their suits in the state court which are here temporarily enjoined. If these state actions are in rem or quasi in rem, then the district court had jurisdiction to enjoin temporarily their prosecution.

In determining the nature of the state court actions the controlling consideration is the nature of the relief asked. *Princess Lida v. Thompson*, 305 U. S. 456, 465, 466. While the complaints filed in these actions are not in this record, the Government's petition for injunction alleged (Pars. IX, X, R. 71) that they were "for the possession of the personal property (or its value in damages for withholding)," an allegation admitted by appellants' answer (Pars. IX, X, R. 125-126). Obviously, insofar as the suits seek recovery of possession of specific property, they

are in rem. *Frost v. Witter*, 132 Cal. 421, 426, 64 Pac. 705 (1901). The state court would have to have possession and control of the property in order to grant the relief sought by appellants. And since possession and control of the property had been acquired by the federal court below prior to the filing of the state court actions, the jurisdiction of the state court must yield.

Indeed, in declining to enjoin the earlier state actions (R. 53-63) Judge McCormick, applying the principle here contended for by the Government, held (R. 56-57) that these actions were in rem or quasi in rem. He pointed out (R. 57-58) that a money claim for the value of property which is sued for but which defendant may fail to return is quasi in rem. *Brooklyn Trust Co. v. Kelby*, 134 F. 2d 105, 116 (C. C. A. 2, 1943); *Lee v. Silva*, 197 Cal. 364, 240 Pac. 1015 (1925). But, because the state actions were commenced before the amended complaint in condemnation was filed Judge McCormick held the state court had first acquired jurisdiction.

Except for the specific property which appellants seek to recover, the state court actions here enjoined are indistinguishable from those which Judge McCormick would not enjoin. All therefore are in rem or quasi in rem. In the case at bar, however, the state court actions were filed *after* the federal court acquired jurisdiction. Accordingly, the federal court was not prohibited by section 265 of the Judicial Code from enjoining these actions if such injunctions were necessary to protect its jurisdiction.

The district court rightly refused to vacate the temporary injunction

Except where some rule of law governs, the action taken by a trial court upon an application for injunction pending suit rests in its sound discretion and will be disturbed on appeal only when there has been an abuse of discretion. See e. g., *Meccano, Ltd. v. John Wanamaker*, 253 U. S. 136, 141 (1920); *Alabama v. United States*, 279 U. S. 229, 231 (1929). Obviously, the same considerations govern on review of an order refusing to vacate such an injunction.

Appellants' attack on the temporary injunction is premised on the assumption (see e. g., Br. 23-25) that the property claimed in the enjoined state actions is personal property and hence (so appellants say) not covered by the original complaint in condemnation filed September 28, 1942, and therefore their property was not condemned until the amended complaint was filed on January 12, 1944. If it were *clear* that the property in question was not condemned in 1942, there might be basis for vacating the injunction. *Nisonoff v. Irving Trust Co.*, 68 F. 2d 32, 33 (C. C. A. 2, 1933). But the character of this property—whether it is real or personal—is much in dispute, was not determined by the trial court, and on the record here cannot be determined by this Court.

Thus, in the hearing upon the application for the injunction (R. 197-266) the Government made plain that, contrary to appellants' present assumption, it had always taken the position that the property was

part of the realty taken on September 28, 1942 (see R. 206-209, 239-240, 254-255). It was because of the Government's contention and of the impossibility of then determining the question it raised that the trial court issued the order temporarily restraining the state suits (see R. 262). Since the trial court did not have before it the facts necessary for solution of the problem, it is obvious that the record on appeal is equally barren.² It results that the temporary injunction should stand until the question can be determined.

Indeed, it is difficult to imagine a plainer case for an injunction pendente lite. Its issuance has not prejudiced appellants. But had it been withheld, the rights of the United States could have been seriously impaired.

As to appellants: The question of whether the property claimed by them was included in the condemnation complaint filed September 28, 1942, in the federal court can be determined only by that court. If it so holds, then appellants have no cause of action against the Union Oil Company and, of course, cannot maintain the suits now temporarily enjoined. If, on the other hand, the federal court finds the property

² Much equipment used in the production of oil is part of the real estate of California. *Big Sespe Oil Co. v. Cochran*, 276 Fed. 216 (C. C. A. 9, 1921); *Cortelyou v. Baker*, 182 Cal. 168, 187 Pac. 417 (1920). But the character of the property involved in this proceeding cannot be determined by examining such decisions. Whether or not property is so affixed to the land as to become part of it is a question of fact to be determined upon the evidence in the particular case. *People v. Church*, 57 Cal. App. 2d 1032, 1037-1038, 136 P. 2d 139 (1943).

was not taken in 1942 appellants will be free to prosecute the suits—and to recover the value of the property plus damages for its withholding. Thus, it is plain appellants have not been hurt by issuance of the temporary injunction.

But, as to the United States: If the injunction had not been entered—or if it had been vacated—appellants could have prosecuted their suits in the state court *before* the federal court was able to determine the date of taking. And, as in the federal court, the determinative issue would have been whether the United States condemned the property in 1942. This would have depended upon a construction of the Government's original complaint. Conceivably the complaint could have been construed contrary to the contention of its framer and, in that event, defendant Union Oil Company would have been compelled under California law to account for a tortious taking: value of the property from September 28, 1942, plus damages for loss of use from that date to January 12, 1944.³ The United States would have been obliged to satisfy the judgment (R. 75, 231).

Thus, with the conclusion of the state trial and the entry of judgment for appellants, one item of the condemnation proceedings would have in fact terminated. Faced with these consequences, the United States would have been compelled to go into the state court and to litigate there an issue it had earlier

³ Appellants believe that in the state courts they would recover more than just compensation. Their counsel told the court below that "we could recover a larger judgment * * * in the State court" (R. 236).

initiated in the federal court. In effect, it would have been forced to try this part of the condemnation proceedings in the state court.

When regard is had to the facts that appellants have not been hurt by the temporary injunction and that the United States should not be ousted from the tribunal which the law permits it to enter, it is manifest that the order of the district court should not be reversed.

CONCLUSION

Therefore, it is submitted that the order should be affirmed.

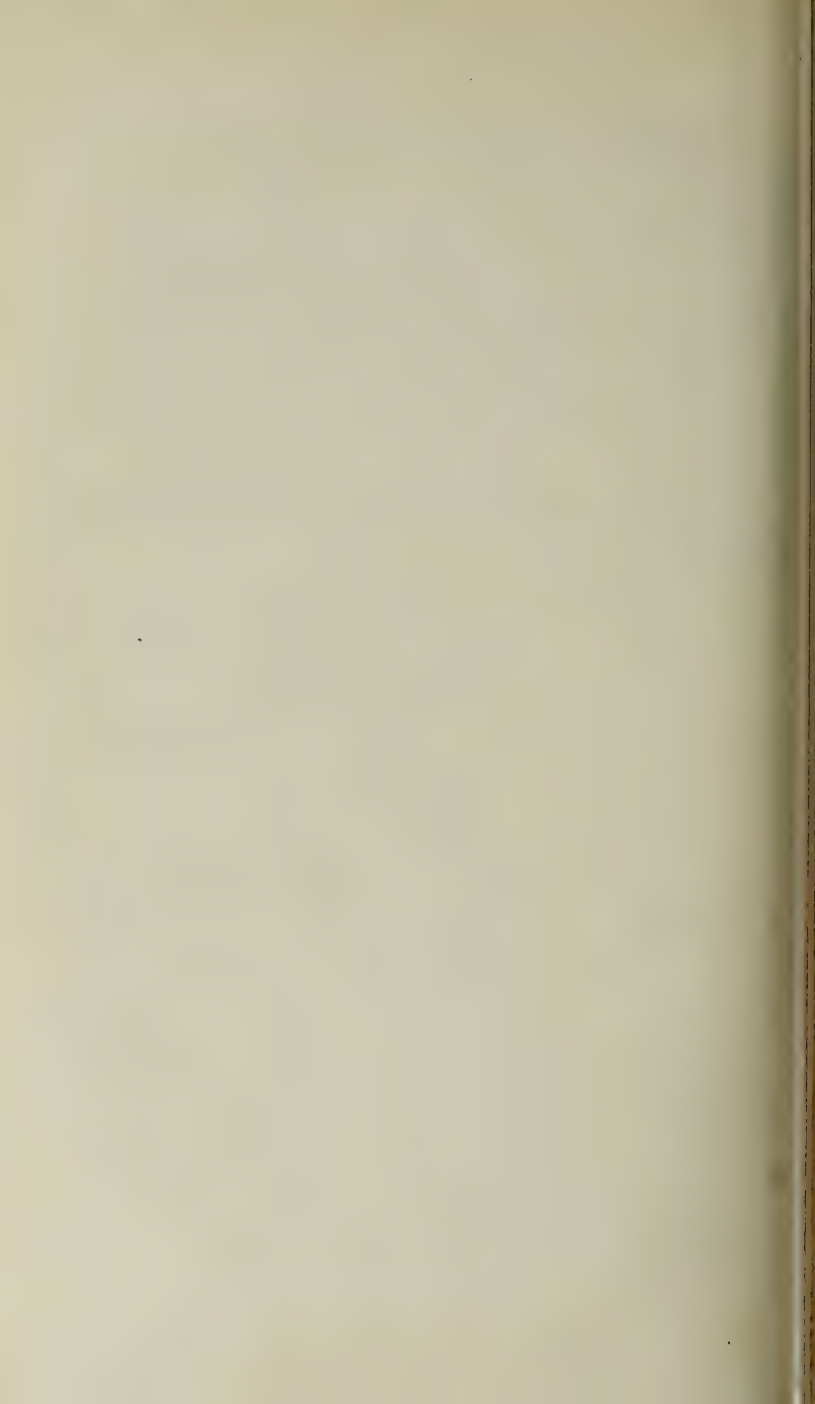
Respectfully,

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APRIL 1948



No. 11768

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

TREASURE COMPANY, a corporation, and SAMARKAND OIL
COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' CLOSING BRIEF.

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MAY 11 1946

PAUL F. O'BRIEN,

CLERK

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vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' CLOSING BRIEF.

Questions Presented on This Appeal.

Appellee declares that the first question presented on this appeal is whether the District Court of the United States, which has acquired jurisdiction over property by the institution of condemnation proceedings, has jurisdiction to enjoin temporarily the prosecution of actions subsequently brought in the state court to recover such property or damages for its withholding.

An action for the condemnation of land only was commenced by the filing of the original complaint on September 28th, 1942, at which time a declaration of taking of land was filed, and on the same day Judge Beaumont

signed an order for immediate possession of land. [R. pp. 14 to 19.]

The United States Marshall purporting to act under such order unlawfully delivered the personal property and equipment situated on the land to Union Oil Company of California, a corporation (hereinafter called Union Oil Company), without any authority so to do. On the same day, September 28th, 1942, the Union Oil Company wrongfully, and without any right, took possession of said personal property and equipment and thereafter continuously and until January 12th, 1944, wrongfully held possession thereof. [See Judge Palmer's Findings of Fact and Conclusions of Law in case No. 948-319, of the Superior Court of the State of California, in and for the County of Los Angeles, R. pp. 138-9.]

A so-called amended complaint in condemnation was filed on January 12th, 1944, whereby it was sought for the first time to condemn the equipment and personal property belonging to the appellants, and situated upon the land described in the original complaint in condemnation. [R. pp. 37 to 46, incl.] No Declaration of Taking, or Decree of Taking was ever made or entered in reference to the equipment, or personal property sought to be condemned by such amended complaint.

On September 27th, 1945, the appellants filed separate actions in the Superior Court against the Union Oil Company alone, to recover possession of certain of the personal property consisting of oil well equipment, or for its value, and for damages for withholding. [R. p. 125.]

The United States District Court not having acquired jurisdiction of the personal property until some fifteen months after the wrongful taking of the personal property consisting of tools and equipment by the Union Oil Company, the first question must be answered in the negative, as no recovery can be had in the condemnation action for the deterioration or rental value of the personal property while it was unlawfully in the possession of the Union Oil Company, from September 28, 1942, to January 12, 1944.

From this it follows that the second question suggested by the appellee, namely, did the District Court err in refusing to set aside the order restraining the prosecution of the State court actions pending the determination of the condemnation proceedings must be answered in the affirmative.

ARGUMENT.

I.

Section 265 of the Judicial Code Forbids the District Court Enjoining State Court Actions, Even Though the Injunctive Relief Is Sought by the United States, Unless the Rights of the United States Cannot Be Otherwise Protected.

Neither the United States, nor any of its agencies are parties defendant to the State court actions, and therefore no rights of the United States can be said to be involved in those actions.

Even though it be assumed that the District Court acquired jurisdiction of personal property by the filing of the amended complaint on January 12, 1944 (but it did not because there was never any Declaration of Taking, or Decree of Taking, made or entered in respect thereto), any award for the taking of such personal property must be limited to the value of such property on January 12, 1944.

This personal property has been subjected to the elements for over six years, now, resulting in great deterioration in its value, and much of it has been removed from the premises entirely. In this connection it is to be noted that Judge McCormick in his opinion rendered June 12, 1945, denying the injunction restraining the prosecution the prior similar state court actions, said,

“It is apparent that no recovery could be had in the State court actions, except by way of money judgment against the Oil Company.” [R. p. 63.]

Under these circumstances the United States cannot be harmed by permitting the State court actions to proceed to judgment against the Union Oil Company.

It is contended by the appellee that Section 265 of the Judicial Code does not apply to petitions by the United States for injunctive relief.

The only case cited by the appellee which involved an application by the United States for injunctive relief is that of the *United States v. De War*, 18 Fed. Supp. 981. The other cases cited by appellee in this connection involved the question of the exemption of the United States from the operation of certain Federal statutes.

In the light of the facts presented in the present case *United States v. De War, supra*, favors appellants rather than the appellee. In that case the United States commenced an action in the Federal Court to enjoin the prosecution of an action in the State court whereby the plaintiff in the State court action, the defendant in the Federal Court action, sought to enjoin Brooks, the Regional Grazer, from collecting a license fee as a condition precedent to the granting of grazing permits, which it was contended was in excess of the power conferred on the Secretary of the Interior by the act of Congress. The court pointed out that the Federal Court could not assume that the State court would erroneously construe a Federal statute, nor erroneously determine the question of whether the United States was a necessary party to the action. The Court in holding that under the circumstances the Federal Court would not enjoin the State court actions, because it did not appear that the rights of the United States could not be otherwise protected, said at pages 983-4:

“While the statute cited *supra*, respecting the issuance of injunctions against proceedings in state courts, does not apply to cases where the United States is a party plaintiff in a suit to enforce the rights of the United States, nevertheless an injunction will not issue in such a case unless such rights

otherwise could not presently be protected. This is not a case within recognized limitations justifying the issuance of a writ of injunction. *United States v. Bank of New York & Trust Co.*, 296 U. S. 463, 479, 56 S. Ct. 343, 348, 80 L. Ed. 331; *Wells Fargo & Co. v. Taylor*, 254 U. S. 175, 41 S. Ct. 93, 65 L. Ed. 205; *Russell v. Detrick (C. C. A.)* 23 F. (2d) 175; *Hammond Hotel & Improvement Co. v. Finlayson (C. C. A.)* 6 F. (2d) 446."

We have been unable to find any case in which a State court action was enjoined upon the application of the United States, and as was held in the *De War* case, the statutory exceptions to Section 265 of the Judicial Code should not be extended by judicial construction, unless absolutely necessary for the protection of the rights of the United States.

The leading case on the construction of Section 265 of the Judicial Code is that of *Tousey v. New York Life Insurance Company*, 86 L. Ed. 100. In that case the court in pointing out that the only exceptions which have been implied in respect to Section 265 of the Judicial Code, is the one in respect to the "*res*" cases, said at page 108:

"We find, therefore, that apart from congressional authorization, only one 'exception' has been imbedded in Section 265 by judicial construction, to wit, the *res* cases. The fact that one exception has found its way into Section 265 is no justification for making another."

This clearly indicates that the fact that the United States is the applicant for injunctive relief is not a factor to be considered in determining whether the injunction should be granted.

We conclude that the injunction in this case cannot be justified upon the grounds that the applicant was the United States.

II.

The State Court Actions Are Actions in Personam Rather Than Actions in Rem, and the Injunction Should Not Have Been Granted.

The appellee contends that the injunction was proper because the State court actions were actions *in rem*, aside from the fact that the applicant was the United States.

If the State court actions are primarily actions *in personam* the injunction was improperly granted, for there would be no conflict of jurisdiction. This is pointed out in *Tousey v. New York Life Insurance Company, supra*, wherein the court states at page 106:

“The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist, the rule does not apply. Since that necessity does exist in actions *in rem* and does not exist in actions *in personam*, involving a question of personal liability only, the rule applies in the former but does not apply in the latter.”

Appellee states at page 8 of its brief:

“While the complaints filed in these actions are not in this record, the Government’s petition for injunction alleged [R. 71, Pars. IX, X] that they were ‘for the possession of the personal property (or its value in damages for withholding),’ an allegation admitted by appellants’ answer [R. 125-126, Par. IX, X].”

While this is a correct description of the designation of the State court actions set forth in the Government’s petition for injunction, it is not a correct description of the

designation of the State court actions set forth in appellants' answers, for that is as follows:

"Admit that Sarmarkand Oil Company, a corporation, filed action number 505-968 in the Superior Court of the State of California, in and for the County of Los Angeles, for the recovery of a portion of said personal property described in said inventory or for its value, and for damages for its withholding
* * * [R. p. 125.]

The language used in the answer for the description of Treasure Company's action No. 505-967, is the same.

It thus appears that the actions are for the possession of personal property, or its value, and for damages for withholding, but not for the possession of personal property (or its value in damages for withholding), as stated by the appellee.

In other words, the State court actions were for possession of the property or its value, not for possession or damages for withholding, as appellee's statement would indicate.

It is apparent, therefore, that the State court actions are not strictly actions *in rem*, but are what are termed mixed actions. In *Fredericks v. Tracey*, 98 Cal. 658, the court in discussing the dual nature of actions for the recovery of personal property, or for damages for its value if recovery cannot be had, said at pages 659 and 660:

"Plaintiff had judgment as before stated.

The question is, Did the complaint state facts sufficient to constitute a cause of action? Replevin (claim and delivery) is an action at law for the recovery of specific personal chattels, wrongfully taken and detained, or wrongfully detained, with damages which the wrongful taking or detention has oc-

casioned. It is what we usually term a mixed action, being partly *in rem* and partly *in personam*—*in rem* so far as the specific recovery of the chattels is concerned, and *in personam* as to the damages.”

The same rule is announced in *Dewing v. Thompson*, 19 Cal. App. 85, in which case the court said at page 88:

“An action in claim and delivery has two aspects: In one it is a suit to recover specific personal property. In the other it is a suit to recover a money demand, and as such the amount demanded exclusive of interest is the test of jurisdiction.”

In *Claudius v. Aquirre*, 89 Cal. 501, the plaintiff brought an action in claim and delivery, and obtained possession before the entry of judgment. By the terms of the judgment the plaintiff was awarded possession of the property, without damages. The defendant appealed because the judgment did not provide for the recovery of the value of the property. However, the court in holding that judgment for possession alone, if possession has been recovered before the entry of judgment, or judgment for the value of the property alone, if recovery of possession has not been had before trial, are equally valid said at pages 504, 504-505 and 505:

“2. Section 667 of the Code of Civil Procedure declares that ‘in an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or the value thereof in case a delivery cannot be had, and damages for detention.’

* * * * *

“Under the provisions of section 627 of the Code of Civil Procedure, in an action for the recovery of specific personal property the jury are authorized to find the value of the property, if their verdict be in

favor of the plaintiff, only 'if the property has not been delivered to the plaintiff,' and, *e converso*, if the property has been delivered to the plaintiff, they are not required to find the value; and in the absence of such finding, there is no verdict upon which to base an alternative judgment."

* * * * *

"We can see no difference in principle between a judgment for the value of the property sued for, without the alternative for its delivery, and a judgment for the delivery of the property without an alternative for its value. If the former is free from error, the latter must be equally so."

The rule thus announced was approved in *Webster v. Mountain Monarch Co.*, 6 Cal. App. (2d) 450 at 454.

It appears, therefore, that the court in the State court actions may render a money judgment in favor of the plaintiffs therein, whereby plaintiffs will receive all of the relief to which they are entitled, such plaintiffs not having received possession of the property, without interfering with the jurisdiction of the District Court in the condemnation action.

Particularly is this true, in view of the fact that the prayer of the respective complaints in the State court actions are in the alternative, namely, for the possession of the property, or, if possession cannot be had, then judgment for money for its value.

The contention of the appellee that the decision in *Brooklyn Trust Company v. Kelly*, 134 F. (2d) 105, sustains the conclusion that the claim for a money judgment in the State court actions is *quasi in rem* is untenable.

In the *Brooklyn* case the Brooklyn Trust Company, as a testamentary trustee under a trust created by the will

of one Coffin, brought an action in the New York State court against one of the old trustees for a series of bonds issued by the debtor Prudence Bond Company, to compel the old trustee to replace certain securities which the old trustee had wrongfully permitted the debtor to withdraw from the trust estate. The new corporation created as a successor to the original debtor, as well as two of the bondholders, were made parties defendant in such action.

Theretofore the Prudence Bond Company had filed a petition for reorganization, under Paragraph 77 of the Bankruptcy Act. On July 12, 1939, the court in bankruptcy made an order declaring that it had taken full jurisdiction of all restoration actions, and restraining all State court actions, and referring all claims to a special master.

Upon the commencement of the State court action the bankruptcy court enjoined the prosecution of the State court actions. The Brooklyn Trust Company took an appeal from this order, and contended that the injunction was improperly issued because only a money judgment was sought against the defendant trustee. The court in rejecting this contention said at page 115:

"If, as Brooklyn argues in its briefs here, its purpose as plaintiff in the state court action was merely to obtain a money judgment against Manhattan and in no way to interfere (except such interference as might result via the *Erie R. Co. v. Tompkins* doctrine) with the action against Manhattan in the bankruptcy court, then Brooklyn's joinder of the new company and those two bondholders is inexplicable."

* * * * *

"No harm to the Coffin estate could conceivably come about from the federal action if all that Brooklyn wanted in its suit were a money judgment against Manhattan. It is plain beyond a doubt that what

Brooklyn seeks is a decree by the state court against the new company and the two bondholders—a binding, judicial determination, *quasi in rem*, of their status, to the effect that they have no right to assert in the action pending in the federal court any claim on behalf of present or future bondholders for restoration by Manhattan to the corpus of the trust fund on account of wrongs done by Manhattan while Mrs. Coffin or her estate was still a bondholder. Clearly, such a judicial determination by the state court would seriously interfere with the jurisdiction of the bankruptcy court in the restoration action against Manhattan.

* * * * *

“The injunction order was proper solely because of the nature of the relief sought in the state court suit and of the nature of the action against Manhattan pending in the bankruptcy proceedings.”

In holding that the power to compel a trustee to restore trust funds was a remedy *in rem*, the court said at page 111:

“The exercise of the court’s power to compel such an old trustee to restore trust assets, lost by its negligent conduct, concerns the *res* itself and is, therefore, *quasi in rem*.”

It was under such circumstances that the court used the language quoted by Judge McCormick, and relied upon by the appellee here, to the effect that it is not true that a money claim *in personam* cannot be a “*res*.”

It is clear from the foregoing that if the Brooklyn Trust Company had only sought a money judgment against the trustee the injunction would not have been granted.

Moreover, if the personal property described in the State court actions is now in the possession of the United

States, the United States not being a party to the State court actions, recovery of the possession of the personal property cannot be secured by the plaintiffs in the State court actions.

As above indicated Judge McCormick found that no relief but a money judgment could be recovered by the plaintiffs in the State court actions. It necessarily follows that the injunction restraining the prosecution of the State court actions should not have been granted and the court exceeded its jurisdiction in so doing.

III.

The Court Abused Its Discretion in Refusing to Dissolve the Injunction.

The appellee practically concedes that if the property described in the complaints in the State court actions was in fact personal property, and therefore not subjected to the jurisdiction of the District Court by virtue of the filing of the original complaint on September 28, 1942, the injunction should have been dissolved, but contends that the trial court did not determine whether the property described in the State court actions was real or personal property, and that such question cannot be determined by this court upon this appeal.

This contention entirely overlooks the affidavit of G. de Brettville filed in support of appellants' motion to vacate the injunction, the material part of which is as follows:

"The Plaintiffs in said Superior Court actions seek to recover from said Union Oil Company certain oil well drilling and operating tools, equipment and supplies, including galvanized tanks, loading racks, bolted steel tanks, pipe lines, steel stairway, gauges, valves,

nipples, gate valves, electrically power driven pumping plant, sucker rods, jump pump, dehydration tank, trumble gas trap, water lines, gas pipe lines, unitized heavy duty surface hoist, two cylinder American compressor, $7\frac{1}{2}$ ton ice machine complete, several hundred feet of tubing, none of which items are or at any time were embedded in the land or permanently resting thereon, or permanently attached to that which is embedded in or permanently resting on the land by means of cement, plaster, nails, bolts or screws.

That the tubing above referred to is not embedded in the land but is temporarily placed inside of the metal casing which is surrounded by cement and which casing and cement serve to hold back the adjacent earth thereby forming and maintaining the hole in which the removable metal tubing is placed and in which tubing the sucker rods are in turn placed and upon the end of which sucker rods the pump is attached which forces the oil to the surface of the earth.

All of the above described items and all of the items described in the complaints in the respective state court actions, above referred to, except said casing which is not sought to be recovered in said state court actions, are readily removable and in good oil well drilling practice are from time to time moved from one well to another as drilling operations may require without injury to any of such items sought to be recovered in said state court actions or to the real property.

That by the terms of the lease and sublease under which Treasure Company and Samarkand Oil Company were in possession of the (159) land sought to be condemned in the above entitled action the lessee and sublessees are granted the right to remove from said land during the term of said lease and subleases

and at any time within three months after the expiration or other termination thereof all derricks, machinery, rigs, pipe, pumping stations and other property and improvements belonging to or furnished by the lessee or sublessees." [R. pp. 183-185.]

No evidence was offered in contradiction of this affidavit and therefore this court must take it to be true. There was no opinion written by the trial court either in connection with the granting of the injunction or the denial of motion to vacate the injunction. Therefore, it cannot be said that the trial court did not accept this affidavit to be true.

It appears from the affidavit of Mr. de Brettville that it is not sought in the State court actions to recover compensation for the casing in the well, the retention of which in the well is essential to the continued existence of the well.

In *United Natural Gas Company v. James Brothers Loan Company*, 191 Atl. 12, the court held oil well equipment and appliances to be trade fixtures.

The same rule is stated in *Brazos River District v. Adkinson*, 173 S. W. (2d) 294, in which the defendant District filed a cross-complaint in condemnation. See discussion of this case and its applications to the present case at pages 46-50, inclusive, of our opening brief.

It is to be noted that by the original complaint in the condemnation action it was only sought to condemn land without any reference to any improvements or equipment situated thereon. [See original complaint, R. p. 7; order for immediate possession, R. p. 14; the declaration of taking, R. p. 20, and the decree on declaration of taking, R. p. 31.]

In *People v. Church*, 57 Cal. App. (Supp.) 1032, the plaintiff which was the condemnor in a prior action, brought the instant action to recover possession of certain gasoline pumps, which were attached to underground tanks by means of pipes, which were screwed into the tanks at one end and into the pumps at the other, and to recover possession of an automobile hoist which rested on a cement base, some six feet under the ground.

The complaint only sought to condemn land, having made no reference to any equipment located thereon. The court in holding that the defendant had not been compensated in the condemnation action for such equipment as would have a substantial value disconnected from the premises, said at page 1055:

“And as was held In re Acquiring Property on North River, 103 N. Y. S. 908, while in condemning for street purposes land improved with a building erected for a factory it is incumbent on the city to pay for such machinery as has become a part of the building, not even the tenant can require it to pay for such machinery as can be readily removed, and will have a substantial value disconnected from the building. If that be true it is manifest that the condemnor cannot compel the tenant to leave such machinery on the premises.”

It is clear from the affidavit of Mr. de Brettville that the equipment described in the State court actions had a substantial value disconnected from the oil well in connection with which it was being used at the time of the commencement of the condemnation action, on September 28th, 1942, and therefore would receive no compensation for it in the condemnation action, as it originally sought to condemn land only.

It is finally contended that the injunction was properly granted because Defense Plant Corporation entered into a contract of employment and indemnity with the Union Oil Company, whereby it agreed to save Union Oil Company harmless from and against all claims on the part of third persons resulting from the condemnation, taking or acquisition of the *site*, or any portion thereof, or possession or occupancy thereof by Union Oil Company under its said agreement of employment by said Defense Plant Corporation. [See R. p. 75.]

At the outset it is to be noted that the indemnity feature of the contract, according to the allegations in the petition for injunction, relates only to damages arising from the condemnation, taking or acquisition of the site, and does not extend to claims for damages arising from the condemnation, taking or acquisition of any personal property or equipment which might have been situated thereon.

Further it is to be noted that this contract between Defense Plant Corporation and Union Oil Company was not entered into until August, 1943. [See opinion of Judge McCormick, R. p. 53.] In view of this fact it is clear that neither Defense Plant Corporation nor the United States would be liable to indemnify Union Oil Company for any claims against the Union Oil Company arising from the taking, condemnation or acquisition of the personal property described in the State court actions (or any other property for that matter) on September 28, 1942, and its subsequent detention prior to the execution of the indemnity contract in August, 1943, even assuming it covered personal property.

Neither is the United States entitled to have the question of its liability to Union Oil Company under such indemnity agreement determined in the Federal Court before

the liability of the Union Oil Company to the appellants is determined in the State court actions. This is pointed out in the case of *Lincoln Mutual Casualty Company v. Spencer*, 47 Fed. Supp. 802. In that case the plaintiff insurance company sought an injunction in the Federal Court to restrain the prosecution of an action in the State court, by which Mang sought to recover damages from Spencer, it being contended by the insurance company that it was entitled to have its liability to Spencer under the policy determined in the Federal Court before the trial of the action against Spencer in the State court. In rejecting this contention the court said at page 803:

“Obviously, the case at hand is not within any of these recognized exceptions, and furthermore, adhering to the language of Justice Frankfurter in the *Toucey* case, *supra*, to wit: ‘We must be scrupulous in our regard for the limits within which Congress has confined the authority of the courts of its own creation’, these exceptions should not be enlarged unless it appears necessary.”

If it be said that the rule thus announced in *Lincoln Mutual Casualty Company v. Spencer, supra*, is not applicable to the present case because the United States was the applicant for injunctive relief, we submit that in accordance with the rule laid down in *United States v. De War, supra*, it must be assumed that the State court will properly determine the question of the liability of the Union Oil Company to the appellants herein, upon which liability the secondary liability of the United States, to Union Oil Company, if any (and under the circumstances above outlined we fail to see how there could be any such liability), would be dependent, and therefore the injunction should not have been issued, but having been issued should have been dissolved.

The Court in *United States v. De War, supra*, pointed out that the case did not involve any question of direct injury to the United States by way of trespass, and in holding that under the circumstances the Federal Court would assume that the State court would properly determine whether the rule promulgated by the Secretary of the Interior was a valid exercise of the power conferred by the Congress, said at page 983(B):

“Assuming, solely for the purpose of the question under consideration whether this is a case within an exception to the general rule, that a federal court will not issue an injunction to prevent the prosecution of a case pending in a state court, that the said rule of the Secretary of the Interior, which is the basis of both suits, is in fact a valid exercise of power conferred by Congress rather than a usurpation of power not so conferred as, in effect, alleged by the plaintiffs in the state suit, can this court now assume that the state court will erroneously decide the question when presented to that court? We think it clear that this court cannot so assume.”

That no entanglements would result from permitting the State court's action to proceed to judgment is apparent from a separate consideration of each of the following five possible eventualities, namely:

1. If a Federal Court holds that the personal property was never lawfully taken, no judgment in condemnation would ensue;
2. If the Federal Court finds that there was no lawful taking of personal property prior to the filing of the amended complaint, it could not award damages accruing prior to such time;

3. If the Federal Court finds the taking to be lawful and such judgment follows the judgment of the State court against the plaintiff, the plaintiff in the State court action would be entitled to recover in the Federal Court action;

4. If prior to the Federal Court judgment the State court found for the plaintiff and such judgment was paid or satisfied on execution the Union Oil Company would be entitled to recover the value of the property in the condemnation action;

5. If the State court found that the unlawful taking became lawful upon the filing of the amended complaint the State court could award plaintiff damages accrued up to the time of the filing of the amended complaint, in which case the plaintiff in the State court action would be entitled to recover in the condemnation action the value of the property, or the court might give the plaintiff judgment for the entire value of the property, in which case the Union Oil Company would be entitled to recover the value of the property in the condemnation action.

In each instance assumed under the fifth subdivision the award by the Federal Court would be based upon the value of the property at the time the taking first became lawful. By such procedure the Union Oil Company would properly be required in either event to compensate the owners for the wrongful detention of the property. We thus see that no entanglement of status would result from the two trials.

It is further to be noted that Judge McCormick found that any contention on the part of the government, that it was originally intended to condemn personal property, was an afterthought to avoid the possible consequences of the seizure of September 28, 1942. [See R. p. 61.]

The following appears at the bottom of page 12 of the appellee's brief:

"Appellants believe that in the state courts they would recover more than just compensation. Their counsel told the court below that 'we could recover a larger judgment * * * in the State court'" [R. p. 236].

Have not appellants the right to recover the full amount of their damages?

If under the peculiar circumstances of the case, full damages cannot be recovered in the District Court are appellants to be criticized for seeking relief in the State court?

It was held in *United States v. Block*, 160 F. (2d) 604, that the value of the property taken in a condemnation action must be determined as of the date of the first lawful taking.

The full statement of counsel for appellants above referred to is as follows [quote R. p. 236]:

"But the gist of this, if your Honor please, and the reason they are so vigorously opposing it is this: In an action in the State Court we have a right to recover the reasonable value of the property at the time it was taken, together with reasonable rental value so long as it was unlawfully withheld, and oil property, oil drilling equipment and tanks and things like that have a very high rental value, so that so far as we are concerned we could recover a larger judgment there for that damage than if we were to go in and say—(50)

The Court: You say you could recover it there; where do you mean?

Mr. Bodkin: In the State Court.

The Court: It would be to your advantage to try it in the State Court?

Mr. Bodkin: It would be to our advantage to try it in the State Court, certainly. And we feel if we have that lawful right we should be permitted to use that lawful right."

Conclusion.

In view of the facts above set forth, it is clear that the trial court abused its discretion in granting the injunction restraining the trial of the State court actions and in refusing to vacate such injunction. Hence, the order denying the motion to vacate the injunction should be reversed.

Respectfully submitted,

BODKIN, BRESLIN & LUDDY,

By HENRY G. BODKIN,

*Attorneys for Appellants Treasure Company and
Samarkand Oil Company.*

No. 11768.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TREASURE COMPANY, a corporation, and SAMARKAND OIL
COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

BODKIN, BRESLIN & LUDDY,

1225 Citizens National Bank Building, Los Angeles 13,

Attorneys for Appellants.

FILED

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IN THE

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FOR THE NINTH CIRCUIT

TREASURE COMPANY, a corporation, and SAMARKAND OIL
COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

*To the Honorable Justices of the United States Court of
Appeals for the Ninth Circuit:*

The appellants, Treasure Company, a corporation, and Samarkand Oil Company, a corporation, respectfully petition for a rehearing by this Court after its decision dated August 6, 1948.

The appeal in this case was taken from an order made by the District Court of the United States, in and for the Southern District of California, Central Division, denying appellants' motion of May 28, 1947, to dissolve and vacate the order of said District Court made January 27, 1948, restraining appellants from prosecuting in the Superior Court of the State of California, in and for the County of Los Angeles, two certain actions Numbered

505-967 and 505-968 by which plaintiffs therein sought to recover possession of certain personal property, or for its value, and for damages for its withholding.

Oral argument of this case was had before this Court on July 12, 1948, and the cause thereupon submitted.

On July 14, 1948, this Court made an order vacating such submission and directed the Clerk of the District Court to certify and transmit to the Clerk of this Court a supplemental record an appeal, including the following:

1. All docket entries in this case from March 26, 1946, to October 22, 1947;
2. The motion referred to in the notice of motion filed by appellants on May 28, 1947;
3. A transcript of all evidence taken and all proceedings had at the hearing or hearings on said motion;
[It may be noted a transcript of the proceedings on said motion is set forth at pages 197-266 of the Transcript of Record];
4. The order said to have been made and entered on August 4, 1947.

On July 30, 1948, counsel for appellants addressed a letter to the Clerk of this Court calling attention to the fact that upon the oral argument of this case the Court asked certain questions of counsel for appellants. This letter contained a statement of the views of counsel on such questions and concluded with the request that counsel be permitted to file a supplemental brief in which a discussion of such questions could be formally and more exhaustively presented after the filing of the additional record.

Counsel for appellants were thereafter advised by a letter from the Clerk of this Court under date of July 31, 1948, that if a supplemental brief were desired on the matters discussed in the letter above referred to it would be called for.

Thereafter and on July 28, 1948, such additional record was forwarded by the Clerk of the District Court to the Clerk of this Court but on August 6, 1948, without counsel for appellants being advised of this Court's desire in respect to a supplemental brief this Court rendered its decision in the matter.

Statement of Necessity for the Granting of a Rehearing and Statement of the Principles Involved.

This Court erred in its decision of August 6, 1948, in the following respects:

1. This Court failed to recognize and give effect to the rule at law that no recovery can be had in the condemnation action, No. 2454-B Civil, now pending in said District Court in which appellee is the plaintiff and the appellants are two of the defendants, for the taking deterioration, loss or withholding of personal property which occurred prior to January 12, 1944, the date upon which such personal property first became a part of the res of the condemnation action.

2. In holding that Section 265 of the Judicial Code (28 U. S. C. A. 379) was inapplicable to the State Court Actions Nos. 505-967 and 505-968, not-

withstanding the fact that it appears from the record on this appeal that it will be impossible to recover possession of the chattels described in said State Court actions and that only a money judgment can be obtained in such actions.

3. In holding that the trial court properly restrained the appellants from proceeding to trial in the State Court Actions Nos. 505-967 and 505-968 in so far as the personal property eliminated from the inventory attached to the amended complaint in the condemnation action is concerned.

It is necessary, therefore, that a rehearing be granted in this case in order that a decision may be rendered herein which is in harmony with the other decisions of this Court and the other Circuit Courts of Appeal of the United States and the Supreme Court of the United States.

ARGUMENT.

I.

This Court Failed to Recognize and Give Effect to the Rule at Law That No Recovery Can Be Had in the Condemnation Action, No. 2454-B Civil, Now Pending in Said District Court in Which Appellee Is the Plaintiff and the Appellants Are Two of the Defendants, for the Taking Deterioration, Loss or Withholding of Personal Property Which Occurred Prior to January 12, 1944, the Date Upon Which Such Personal Property First Became a Part of the Res of the Condemnation Action.

At the outset it is to be noted that the original resolution of the Defense Plant Corporation, dated September 18, 1942, authorizing the commencement of the condemnation action, afterwards numbered 2454-B was confined by its terms to the condemnation of land. [Tr. of Record pp. 77-78.] The original complaint filed September 28, 1942, in said condemnation action was by its terms also limited to the condemnation of land. [Tr. of Record p. 7.] The order of immediate possession dated September 28, 1942, under which appellee claimed the right to take possession of the personal property situated on the real property described in such order for immediate possession was likewise by its terms confined to land. [Tr. of Record p. 15.] The declaration of taking dated October 22, 1942, was likewise confined to land. [Tr. of Record, p. 22.] The decree of taking dated October 26, 1942, was also confined to land. [Tr. of Record p. 31.] There was never any order for immediate possession or decree of taking, or declaration of taking made in the condemnation action in respect to personal property. Notwithstanding such facts the personal property sought to

be recovered in State Court Actions 505-967 and 505-968 was seized by the Marshal and delivered to the Union Oil Company on September 28, 1942. This was clearly unlawful and immediately there arose a cause of action in favor of appellants for such unlawful taking and withholding.

The date of September 28, 1942, was clearly fixed as the date of the taking of the personal property involved in Actions 505-967 and 505-968 by the statement by Mr. Lieberman of counsel for Union Oil Company and Reconstruction Finance Corporation in open court upon the hearing of the petition of appellee for an injunction on June 10, 1946, when the following took place:

"The Court: Mr. Lieberman, before you go I want to ask you a question. By the asking of it I don't want you to think that I am doing it in an argumentative way at all, or that I am taking any position, but just for enlightenment, that is all.

The first taking was in November, 1943, I believe you stated?

Mr. Lieberman: September 28, 1942.

The Court: What is it?

Mr. Lieberman: September 28, 1942, was the actual physical taking, and the date of the decree of possession. January, 1944, was the first time—

The Court: What was the date in November?

Mr. Lieberman: November is the date they brought suit.

The Court: All right. I don't want that. Let me get this—

Mr. Lieberman: November, 1943, is the date they brought suit.

The Court: Wait just a minute. When was the actual taking of the personal property?

Mr. Lieberman: September 28, 1942, personal and real were taken on that date.

The Court: When [was] the amendment made to the complaint?

Mr. Lieberman: January, 1944, the amendment which specified the personal property. January, 1944.

Mr. Weymann: January 12, 1944.

The Court: There was a period there of a year and some months. Now, during that time the possession was taken by the marshal; is that correct?

Mr. Lieberman: That is correct.

The Court: And the property was delivered to the Union Oil Company?

Mr. Lieberman: He turned it over to R. F. C., and they immediately turned it over to Union Oil Company." [Tr. of Record pp. 243-4.]

The first mention made of personal property in the condemnation action is found in the amendatory resolution of Defense Plant Corporation adopted October 4, 1943. [Tr. of Record pp. 81-82.] The language of this resolution is in part as follows:

"Resolved Seventh, That it is necessary and advantageous in carrying out the authority vested in Defense Plant Corporation to acquire by condemnation the machinery and equipment described in said Exhibit 'C.'"

It is clear from this that the language of the resolution is in the present tense and cannot be construed to be a ratification of the taking of the personal property on September 28, 1942.

Inasmuch as the original resolution of September 8, 1942, the original complaint in condemnation and the order for immediate possession, the declaration of taking and the decree of taking above referred to, were all limited to land it is obvious that the taking of the personal property on September 28, 1942, was tortious and wholly without right.

Moreover, inasmuch as the original resolution, the original complaint in condemnation, the order for immediate possession and declaration and decree of taking were all limited to land nothing but land could be lawfully taken thereunder, and the taking of any machinery or other equipment, whether it be deemed to be attached to the land or not, was unauthorized for land is defined by Section 659 of the Civil Code of California as the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock or other substance.

It is essential to the protection of the interests of the appellants that a rehearing be granted by this Court in order that an opinion may be written which will set forth the above enumerated facts in regard to the limited purpose of the original complaint in condemnation, and thus enable the Supreme Court of the United States, in the event of an appeal to that Court, to determine whether the District Court abused its discretion in denying appellants' motion to vacate the order restraining the prosecution of State Court Actions Nos. 505-967 and 505-968.

The opinion of this Court rendered August 6, 1948, declares, "On September 28, 1942, the appellee, the United States, took for public use certain property, real and personal, in Los Angeles County, California," and that "At all pertinent times since September 28, 1942, ap-

pellee, by its agent, Union Oil Company, a corporation, hereinafter called "Union," has had possession of all property claimed by appellants."

While this statement does not indicate who actually took the personal property from the appellants it does declare that "Union" has had possession of the personal property claimed by appellants at all times since September 28, 1942. It is to be noted, however, that the answer of appellants to the appellee's petition for injunction in alleging the manner of the taking of the personal property sought to be recovered in State Court Actions 505-967 and 505-968 used the following language:

"Allege that on or about September 28, 1942, Union Oil Company of California, a corporation, without lawful authority and without right, took possession of the personal property described in Exhibit 'B' attached to the petition, together with certain additional property belonging to these answering defendants; that at the time said Union Oil Company of California, a corporation, took possession of said personal property no resolution had been adopted by Reconstruction Finance Corporation authorizing the condemnation of said personal property nor the taking of possession of said personal property or any part thereof and that neither petitioner herein or Union Oil Company of California, a corporation, had any lawful right whatever to take possession of said personal property or any part thereof.

* * * * *

"Admit the allegations contained in Paragraph V of said petition. Allege that said amended complaint was the first and only complaint filed to condemn the personal property and that until said action was filed, petitioner had no lawful right to take, hold or detain

any part of said personal property and any taking prior thereto by Union Oil Company of California or by petitioner was in fact unlawful." [Tr. of Record pp. 123-124.]

In the prior State Court Actions Nos. 489-318 and 489-319 referred to in the opinion by this Court and by which actions appellants herein sought to recover the possession or value of certain other personal property taken by "Union" under the same circumstances as the property involved in Actions Nos. 505-967 and 505-968 was taken, the Court found as follows:

"On the said 28th day of September, 1942 at and on said Block 33 of Tract 9809 in said County of Los Angeles, State of California, without the plaintiff's consent and against its will, a Deputy United States Marshal, without any authorization from any source, without process of court related to said personal property and without direction from any agency of the United States Government falsely and wrongfully and willfully assumed dominion over the said personal property, and wrongfully and willfully took possession thereof and wrongfully delivered said personal property to the defendant, Union Oil Company of California, a corporation, which said defendant on said date and at said place without right or authority wrongfully and willfully took possession of said personal property and thereafter continuously and until January 12, 1944 wrongfully and willfully held possession thereof and detained the same and wrongfully prevented the plaintiff Treasure Company, a corporation, from taking possession thereof." [Tr. of Record pp. 138-139.]

There is no contention made in the brief of the appellee nor upon the oral argument before this Court nor any suggestion contained in the opinion of this Court that such allegations and findings were not correct. In fact, we declared in our opening brief at page 62 as follows:

“As indicated in the answers of the Union Oil Company filed in Actions Nos. 505-967 and 505-968, Actions Nos. 489-318 and 489-319 did proceed to a money judgment, which judgments have been paid and satisfied. It is likewise probable that each of the state actions, the prosecution of which is now sought to restrain, will terminate in a money judgment rather than a judgment for the possession of the property described in the complaints in said actions. In fact, no judgment excepting a money judgment can be rendered in Actions Nos. 505-967 and 505-968.

* * * * *

“In this connection Judge McCormick said [Tr. p. 63]:

“‘We conclude with the observation that the injunction to restrain proceedings in either of the state court actions is unnecessary under the record before us. In the local suits no relief to the oil companies other than money judgments appears to be now possible. Such an outcome in the state court would neither impair nor defeat the jurisdiction of this court in the condemnation proceeding.’”

The correctness of this statement is borne out by Finding No. 21 made by the Superior Court in the State Court Actions Nos. 489-318 and 489-319 which is as follows:

“The court finds that at the time of the commencement of this action, and thereafter until and at all times after January 12, 1944, it was impossible for the defendant Union Oil Company of California, a corporation, to deliver said personal property of the plaintiff Treasure Company, a corporation, or any portion thereof to the said Treasure Company, a corporation in substantially the same condition as it was in when first taken and received by the defendant Union Oil Company of California, a corporation, as aforesaid. . . .”

This statement was not questioned by appellee in its brief or upon oral argument.

The only reason pointed out by this Court for reaching a different conclusion in respect to the appellee's petition of March 10, 1945, whereby it sought an order enjoining the prosecution of the State Court Actions Nos. 489-318 and 489-319 from that reached in respect to appellee's petition of March 26, 1945, whereby it sought an order restraining the prosecution of State Court Actions Nos. 505-967 and 505-968 is the fact that the first two cases mentioned were commenced prior to the filing of the amended complaint in the condemnation action on January 12, 1944, whereas the last two cases mentioned were commenced after the filing of such amended complaint.

It must be concluded, therefore, that the personal property described in the State Court Actions Nos. 505-967

and 505-968 was taken from the appellants by the United States Marshal without authority and by him delivered to "Union" and that only a money judgment can be recovered in such actions.

This Court declared in its opinion of August 6, 1948, that the personal property involved in the State Court Actions 505-967 and 505-968 did not become a part of the res in the condemnation action until January 12, 1944, the language of the Court in this connection being as follows:

"Because Nos. 505967 and 505968 were brought after January 12, 1944, and involved property which, on January 12, 1944, became a part of the res in the condemnation proceeding, and because their prosecution would have impaired or defeated the District Court's jurisdiction of that part of the res, the District Court held that, as to those actions, Par. 265 was inapplicable and, on the basis of that holding, made and entered the order of January 27, 1947, enjoining appellants from prosecuting those actions. The holding that Par. 265 was inapplicable was clearly correct; for the case came within a recognized exception to Par. 265."

In view of this declaration by this Court it is apparent that the District Court obtained no jurisdiction over the personal property prior to January 12, 1944, and it is obvious that there was no taking by the Government prior to the filing of such amended complaint. The law is well settled that the award made by the Court in the condemnation action must be confined to the value of the property at the time of the lawful taking thereof by the

Government. This rule is announced by this Court in *United States v. Block*, 160 F. (2d) 604, at 607, as follows:

“Even assuming that the machinery and equipment were taken on September 28, 1942, it does not appear that appellant was prejudiced by the fact that Rubin’s and Rush’s valuations were made as of October, 1942. Rush and Graydon Oliver, a witness for appellant, testified that the market value of the machinery and equipment in October, 1943, was substantially the same as on September 28, 1942. That testimony was not contradicted.”

Subdivision 5 of Section 1244 of the Code of Civil Procedure of the State of California provides as follows:

“The complaint must contain:

5. A description of each piece of land, or other property or interest in or to property, sought to be taken, and whether the same includes the whole or only a part of an entire parcel or tract or piece of property, or interest in or to property, but the nature or extent of the interests of the defendants in such land need not be set forth.”

All statutory requirements in condemnation proceedings must be strictly complied with. The rule is stated in the *City of Los Angeles v. Glassell*, 203 Cal. 44, at page 46, as follows:

“It requires no citation of authority upon the proposition that eminent domain proceedings are *in invitum*, and the same may be said of proceedings to assess and collect any outlay necessary to the establishment of parks and playgrounds under the act here involved: ‘. . . and the statutory authority (must) be strictly pursued, and every condition or

other prerequisite to the exercise of jurisdiction be observed, especially every requisite of the statute having the semblance of benefit to the landowner. . . .’ (20 Corpus Juris, pp. 882, 883.)”

See also:

Harrington v. Superior Court, 194 Cal. 185, at 191.

The Court can make no award in the condemnation action other than for property which had been lawfully taken. (*Loomis v. City of Augusta*, 99 P. (2d) 988.

The State Court actions are described in the appellants’ answer to the petition for an injunction as follows:

“Admit that Samarkand Oil Company, a corporation, filed action number 505-968, in the Superior Court of the State of California, in and for the County of Los Angeles, for the recovery of a portion of said personal property described in said inventory, or for its value, and for damages for its withholding.” [Tr. of Record p. 125.]

A corresponding allegation is made in respect to Action 507-967. The taking in this case of the personal property prior to January 12, 1944, was without right and tortious and no recovery can be had against the United States on account thereof even in a proceeding initiated in the court of claims under the so-called Tucker Act. (28 U. S. C. A. 250.) By reason of the immunity thus created in favor of the Government it is not answerable for torts of its agents even though they be acting in the purported course of their employment.

In *Sloan Shipyards Corp. v. U. S. Shipping Board, etc.*, 66 L. Ed. 762, the Court said at page 768:

"But the taking possession of the plaintiff's plants, on December 1, 1917, is alleged to have been unlawful; and it cannot be assumed at this stage that the act of the Fleet Corporation was in pursuance of any powers then delegated to it, or was within the ratification of December 3, 1918. The plaintiffs are not suing the United States but the Fleet Corporation; and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name."

See also:

United States v. Goltra, 85 L. Ed. 776.

It is to be noted that while the condemnation action is entitled "United States of America for the use of the Reconstruction Finance Corporation, a Federal corporation, acting in behalf of the Defense Plant Corporation, a Federal corporation," the United States of America is the only plaintiff against which a judgment can be rendered in such action. While Executive Order No. 9217 dated August 7, 1942, purports to confer upon the Reconstruction Finance Corporation the authority to exercise the power of eminent domain, such power can only be exercised by the Reconstruction Finance Corporation as trustee for the Government. This is pointed out in *Cherry*

Cotton Mills v. United States, 90 L. Ed. 835. The Court in speaking of the Reconstruction Finance Corporation said at page 838:

“Its Directors are appointed by the President and affirmed by the Senate; its activities are all aimed at accomplishing a public purpose; all of its money comes from the Government; its profits if any go to the Government; its losses the Government must bear. That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by Government to accomplish purely Governmental purposes.”

It is obvious that the Court in the condemnation action could make no award for the loss, depreciation or unlawful withholding of personal property which occurred prior to the filing of the amended complaint. However, the agents of the Government by whom the personal property was wrongfully taken and detained are liable for such wrongful acts.

In *Philadelphia Co. v. Stimson*, 56 L. Ed. 570, the Court said at page 576:

“If the conduct of the defendant constitutes an unwarranted interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have ‘wrongfully invaded.’”

See also:

Kiefer v. Reconstruction Finance Corp., 83 L. Ed. 784.

It is clear from the opinion of this Court dated August 6, 1948, that the taking of the personal property on September 28, 1942, and prior to the filing of the amended complaint by which the personal property first became a part of the res of the condemnation action was tortious and that, therefore, there is no necessity for any further proceedings in the District Court for the purpose of determining whether such taking was wrongful. As the record clearly shows that such taking was unlawful, it is unnecessary to allow the injunction to continue in force until the trial court declares what already is obvious from the record herein, that the taking and withholding is and was unlawful.

II.

This Court Erred in Holding That Section 265 of the Judicial Code (28 U. S. C. A. 379), Was Inapplicable to the State Court Actions Nos. 505-967 and 505-968, Notwithstanding the Fact That It Appears From the Record on This Appeal That It Will Be Impossible to Recover Possession of the Chattels Described in Said State Court Actions and That Only a Money Judgment Can Be Obtained in Such Action.

Section 265 of the Judicial Code (28 U. S. C. A. 379), provides as follows:

“379. (Judicial Code, section 265.) Same; stay in State courts. The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. (R. S. 720; Mar. 3, 1911, c. 231, 265, 36 Stat. 1162.)”

The only exception to the rule thus stated is that in respect to actions *in rem*.

In the case of *Toucey v. New York Life Ins. Co.*, 86 L. Ed. 100, the Court in speaking of such exception to Section 265, said at page 108:

“We find, therefore, that apart from congressional authorization, only one ‘exception’ has been imbedded in Sec. 265 by judicial construction, to wit, the res cases. The fact that one exception has found its way into Sec. 265 is no justification for making another.”

And at page 106:

“The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or portential, does not exist, the rule does not apply. Since that necessity does exist in actions *in rem* and does not exist in actions *in personam*, involving a question of personal liability only, the rule applies in the former but does not apply in the latter.”

As above indicated, this Court in its opinion held that Section 265 of the Judicial Code was not applicable to State Court Actions 505-967 and 505-968 because they were commenced after the filing of the amended complaint in the condemnation action whereby such personal property first became a part of the res in such condemnation action and that the prosecution of such State Court ac-

tions would impair or defeat the jurisdiction of the District Court of that part of the res.

This Court erred in so holding for the State Court actions are not primarily actions *in rem*, and Section 265 of the Judicial Code is applicable unless the State Court actions are *in rem*.

The rule is stated in *Fredericks v. Tracy*, 98 Cal. 658, at pages 659 and 660 as follows:

“Replevin (claim and delivery) is an action at law for the recovery of specific personal chattels, wrongfully taken and detained, or wrongfully detained, with damages which the wrongful taking or detention has occasioned. It is what we usually term a mixed action, being partly *in rem* and partly *in personam*—*in rem* so far as the specific recovery of the chattels is concerned, and *in personam* as to the damages.”

As above indicated, we stated in our opening brief that no judgment can be recovered in the State Court actions except a money judgment. The prosecution of said Actions 505-967 and 505-968 cannot in any way impair or defeat the jurisdiction of the District Court in any respect for that Court has no jurisdiction to make any award for any damages accruing from the taking or withholding of the personal property prior to January 24, 1944. The District Court has no power to allow damages for the unlawful taking and withholding, and the actions restrained involve causes of action entirely distinct from those involved in the condemnation suit.

III.

This Court Erred in Holding That the Trial Court Properly Restrained the Appellants From Proceeding to Trial in the State Court Actions Nos. 505-967 and 505-968 in so Far as the Personal Property Eliminated From the Inventory Attached to the Amended Complaint in the Condemnation Action Is Concerned.

Paragraph I of the first separate defense contained in appellants' answer to the petition for injunction alleges in part as follows:

“Allege further that under the statute described in plaintiff's petition, as well as in the Executive Order, Reconstruction Finance Corporation only has authority to condemn such personal property as is *'located thereon or used therewith that shall be deemed necessary, for military, naval, or other war purposes,'* and it appears from Exhibit 'B,' particularly pages 103, 104, 109, 110, 111, 112 and 113 that the personal property described therein are *'Items deleted from original inventory as indicated as not being needed in Playa Del Rey Project.'*” [Tr. of Rec. 130.]

The items belonging to Samarkand Oil Company which were deleted from the inventory as not being needed in the Playa Del Rey Project are described at pages 97 to 100, inclusive, of the Transcript of Record and the items belonging to Treasure Company which are deleted from the inventory as not being needed in the Playa Del Rey

Project are described at pages 108 to 118, inclusive, of the Transcript of Record.

Clearly the Court in the condemnation action has no jurisdiction to make an award in respect to the taking of such property because an award made in such action must be limited to property taken for a public use. In *United States v. Certain Lands in the City of Louisville*, 78 F. (2d) 684, the Court in speaking of the right of the Federal Government to exercise the power of eminent domain, said at page 686:

“Equally well settled is it that the right can only be exercised where the property is to be taken for a public use.”

Conclusion.

It appears from the record in the present appeal that the only decision that can possibly be rendered by the District Court upon the trial of the condemnation action in respect to the question of the legality of the taking of the personal property on September 28, 1943, including the pipe, machinery, appliances, equipment, tanks, structures, tools and supplies situated on the land described in the complaint in condemnation would be a decision to the effect that such taking was illegal, tortious and without right. This is so for the reason that whether such personal property be deemed affixed to the land or not the appellee had no authority at any time prior to January 12, 1944, to take or condemn anything but the land. Therefore the District Court would have no jurisdiction to make any award for the wrongful taking of such per-

sonal property on September 28, 1942, or for the loss, depreciation or withholding thereof which occurred prior to January 12, 1944, at which time the amended complaint was filed by which such personal property first became a part of the res of the condemnation action.

It follows that the District Court abused its discretion in refusing to grant appellants' motion to vacate the injunction restraining the prosecution of said State Court actions Nos. 505-967 and 505-968 and that this Court should grant a rehearing in this matter in order that an opinion may be written properly setting forth the facts upon which the District Court purported to act.

Respectfully submitted,

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